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**A TREATISE**  
**ON THE**  
**LAW OF DEEDS**

**THEIR FORM, REQUISITES, EXECUTION, ACKNOWLEDGMENT, REGIS-  
TRATION, CONSTRUCTION AND EFFECT.**

**COVERING**  
**THE ALIENATION OF TITLE TO REAL PROPERTY BY VOL-  
UNTARY TRANSFER.**

**TOGETHER WITH CHAPTERS ON TAX DEEDS AND SHERIFF'S DEEDS.**

**BY**  
**ROBERT T. DEVLIN**  
**COUNSELOR AT LAW.**

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# THE LAW OF DEEDS.

## CHAPTER XX.

### ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN.

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§ 548. Acknowledgment an essential part of the deed. — At common law, a married woman had no power to make a conveyance unless by some matter of record. The only methods by which at common law she



could convey her property were by a fine or common recovery. While now by statute she is permitted to convey her estate, in some States the concurrence of her husband being necessary, and in others not, yet, to make her conveyance effective, the statutory provisions concerning the form and mode of her conveyance must be complied with.<sup>1</sup> In nearly all of the States the certificate of acknowledgment of a married woman of her deed is a material part of it, and absolutely essential to its validity. The common-law restriction on her right to convey has been relaxed, but still it results from such statutes as regard her acknowledgment as a part of the conveyance that the deed is void without such acknowledgment. In a case in Illinois, Mr. Justice Caton correctly stated the rule which generally prevails, and observed: "Without such acknowledgment, the deed was absolutely void, and had no more vitality than a piece of blank paper. Only by virtue of such acknowledgment certificate could the deed become operative. Its execution could be proved in no other possible way, and in no other way could she convey. The certificate of acknowledgment of a deed from a *feme covert* to convey her own lands is as much an essential part of the *execution* of the deed as her seal or signature, and, without it, the law presumes that it was obtained by fraud or coercion."<sup>2</sup> Not even an equitable

<sup>1</sup> See, for a general discussion of this subject, 2 Kent's Com. 151.

<sup>2</sup> *Mariner v. Saunders*, 5 Gilm. 113, 125. See, also, to the same effect, *Hoskinson v. Adkins*, 77 Mo. 537; *Mason v. Brock*, 12 Ill. 273; 52 Am. Dec. 490; *Ewald v. Corbett*, 32 Cal. 493; *Bagby v. Emberson*, 79 Mo. 139; *McLeran v. Benton*, 43 Cal. 467; *Wambole v. Foote*, 2 Dakota, 1; *Terry v. Hammond*, 47 Cal. 32; *Malloy v. Bruden*, 88 N. O. 305; *Morrison v. Wilson*, 13 Cal. 498; 73 Am. Dec. 593; *McLawrin v. Wilson*, 16 S. O. 402; *Dugger v. Collins*, 69 Ala. 324; *Johnson v. Bryan*, 62 Tex. 623; *Mathews v. Davis*, 102 Cal. 202; *Knight v. Paxton*, 124 U. S. 552; *Hogan v. Hogan*, 89 Ill. 427; *Bernard v. Elder*, 50 Miss. 336; *Allen v. Lenoir*, 53 Miss. 321; *Den v. Lewis*, 8 Ired. 70; 47 Am. Dec. 338; *Schroder v. Keller*, 84 Ill. 46; *Coleman v. Billings*, 89 Ill. 183; *Leonis v. Lazzarovich*, 55 Cal. 52; *Muir v. Galloway*, 61 Cal. 498; *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622; *Glidden v. Strupler*, 52 Pa. St. 400; *Spencer v. Reese*, 165 Pa. St. 158; *Evans v. Commonwealth*, 4 S. & R. 272; 8 Am. Dec. 711; *Jourdan v. Jourdan*, 9 S. & R. 268; 11 Am. Dec. 724; *Watson v. Bailey*, 1 Binn. 470; 2 Am. Dec. 462; *Barnet v. Barnet*, 15 S. & R. 72; 16 Am.

title passes by the deed of a married woman defectively acknowledged.<sup>1</sup>

Dec. 516; *Graham v. Long*, 65 Pa. St. 383; *Little v. Dodge*, 32 Ark. 453; *Shryock v. Cannon*, 39 Ark. 434; *Dengenhart v. Cracraft*, 36 Ohio St. 549; *Purcell v. Goshorn*, 17 Ohio, 105; 49 Am. Dec. 448; *Chesnut v. Shane*, 16 Ohio, 599; 47 Am. Dec. 387; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Grove v. Todd*, 41 Md. 633; 20 Am. Rep. 76; *Steffey v. Steffey*, 19 Md. 5; *Krieger v. Crocker*, 118 Mo. 531; *Wannel v. Kem*, 57 Mo. 478; *Burnett v. McCluey*, 78 Mo. 676; *Johnson v. Taylor*, 60 Tex. 360; *Looney v. Adamson*, 48 Tex. 619; *Thayer v. Torrey*, 37 N. J. L. 339.

In *Mason v. Brock*, *supra*, the court say: "A married woman can be divested only of her real estate in the mode prescribed by statute." In *Martin v. Dwelly*, 6 Wend. 9, 21 Am. Dec. 245, Mr. Justice Sutherland says: "By the common law a *feme covert* could not, by uniting with her husband in any deed or conveyance, bar herself or her heirs of any estate of which she was seised in her own right, or of her right of dower in the real estate of her husband. This disability is supposed to be founded on the principle that the separate legal existence of the wife is suspended during the marriage, and is strengthened by the consideration that, from the nature of the connection, there is danger that the influence of the husband may be improperly exerted, for the purpose of forcing the wife to part with her rights in his favor. The law, therefore, considers any such deed or conveyance as the act of the husband only, although the wife may have united in it, and restrained its operation to the husband's interest in the premises, and gives to it the same effect as though he alone had executed the conveyance. The only mode in which a *feme covert* could, at common law, convey her real estate was by uniting with her husband in levying a fine. This is a solemn proceeding of record in the face of the court, and the judges are supposed to watch over and protect the rights of the wife, and to ascertain by a private examination that her participation in the act is voluntary and unconstrained. This is the principle upon which the efficacy of a fine is put by most of the authorities; 3 Cru. Dig. 153, tit. 35, c. 10; 2 Inst. 515; 1 Vent. 121 a. But whatever may be the foundation of the doctrine, it is now fully established. Our statute declares that no estate of a *feme covert* residing in this State shall pass by her deed without a previous acknowledgment made by her before a proper officer, apart from her husband, that she executed such deed freely, without fear or compulsion of her husband: 1 Rev. Laws, 369. This provision, it will be observed, is an enlargement, and not a restraint, of the common-law powers of a *feme covert*. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same power and effect as a fine; but, if not acknowledged according to the directions of the statute, it declares that no estate shall pass by it. It leaves it as it would have stood at the common law, if the statute had never been passed, absolutely void and inoperative." But see *Hawes v. Mann*, 8 Biss. 21.

<sup>1</sup> *Bagby v. Emberson*, 79 Mo. 139. See *Wambole v. Foote*, 2 Dakota, 1.

§ 548a. **Modern Legislation.**—At common law husband and wife were one person, she, by marriage, losing all her legal identity and becoming civilly dead. Her existence was merged in that of her husband, and she was said to be a *feme covert*.<sup>1</sup> In equity, however, her separate existence was recognized. While it was assumed that the identity of the wife was lost, it was presumed that she was under the dominion of her husband, and would act in conformity with his desires and perform no act contrary to his wishes. Husband and wife could not contract with each other, because, in law, they were not two parties but only one; but, in equity, effect was given to a husband's promises, and transfers made by him to his wife were recognized and enforced. But now many restrictions have been removed by legislation and the tendency is to allow her the same freedom to contract and dispose of her property that she would possess if unmarried. In accordance with this tendency statutes now exist in many of the states providing that her acknowledgment to a deed may be made in the same manner as if she were a *feme sole*. Still, even in these states, the validity of conveyances made before the passage of such statutes, depends upon her acknowledgment having been taken and certified with the strictness formerly required. Where the acknowledgment of a married woman is taken as if she were a *feme sole*, it is no longer essential to the validity of her deed. Her deed, unacknowledged, will, in such states, certainly bind her and be valid as against all those having notice. In some of the states the law relative to the acknowledgment of deeds by married women, as distinguished from the general law relating to acknowledgment, is fast becoming obsolete. This chapter is devoted exclusively to a consideration of those statutes which require that the acknowledgment of a deed of a married woman should be taken so as insure her freedom from all compulsion on the part of her husband, and that declare the acknowledgment an essential and indispensable part of the deed.

<sup>1</sup> 2 Kent's Com. 129; Story Eq. §§ 1367, 1370; 1 Blackst. Com. 442; 1 Bishop Mar. & Div. §§ 754-760.



**§ 548 b. Deed defectively acknowledged not an estoppel.**—The deed of a married woman defectively acknowledged passes no title, and a purchaser from her after the death of her husband, with notice of the prior deed, does not become a trustee for the first purchaser, but may maintain ejectment against him. Such a deed defectively acknowledged does not operate as an estoppel against her, and she cannot ratify it by mere recitals and admissions in other deeds or pleadings. Her only mode of ratification is to properly acknowledge it, or to execute another deed properly acknowledged.<sup>1</sup>

**§ 549. The law in California.**—A recent decision in California has left in some doubt whether a deed of a married woman is invalid or not, because the certificate of acknowledgment is defective. Prior to the adoption of the codes, the same rule prevailed as to the necessity for the acknowledgment by a married woman of her conveyance as obtains elsewhere. It was in the early cases held that her conveyance was invalid if not executed according to the provisions of the statute, and that her title did not pass if the certificate of acknowledgment was defective in any substantial respect.<sup>2</sup> In one case that was decided after the adoption of the code, the court held, in conformity with the early decisions, that the certificate of acknowledgment is a material part of a married woman's deed, and essential to make it an operative transfer of title. Mr. Justice Morrison, after examining the cases, said, in delivering the opinion of the court: "We have thus seen that there is but one mode by which a married woman can convey her separate estate, and that is prescribed by statute. All the cases hold that the

<sup>1</sup> *Central Land Company v. Laidley*, 32 W. Va. 134; 25 Am. Rep. St. 797. See, also, *Hayden v. Moffatt*, 74 Tex. 647; 15 Am. St. Rep. 866; *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939.

<sup>2</sup> *Morrison v. Wilson*, 13 Cal. 498; 73 Am. Dec. 593; *Terry v. Hammond*, 47 Cal. 32; *McLeran v. Benton*, 43 Cal. 467; *Ewald v. Corbett*, 32 Cal. 493; *Pease v. Barbier*, 10 Cal. 436; *Judson v. Porter*, 53 Cal. 482. And see *Selover v. A. R. Com. Co.*, 7 Cal. 266; *Barrett v. Tewksbury*, 9 Cal. 13; *Salmon v. Wilson*, 41 Cal. 595.

provisions of the statute must be substantially complied with; and if the certificate of acknowledgment is insufficient, the conveyance is absolutely void."<sup>1</sup> But in a later case, the court held that a different rule was laid down in the Civil Code from what formerly prevailed. The question was whether a defective certificate of acknowledgment to the deed of a married woman could be reformed in a court of equity. In determining this question the court considered the provisions of the statute relative to the acknowledgment of deeds by married women. It was decided that it was necessary, as before, for a married woman to *acknowledge* the execution of her deed, but that the *certificate* of acknowledgment was no part of the conveyance. In other words, her deed would not be void for any defect that might appear in the certificate of acknowledgment, if in fact she had properly acknowledged it.<sup>2</sup> Mr. Justice McKee, in speaking of the first law enacted in the State concerning the conveyances of married women, which required that her deed should be executed and acknowledged by her husband, and certified in accordance with the statute, said: "Execution, acknowledgment, and certification were, therefore, made by the law essentials of the conveyance of the estate of a married woman; and each was required to be made and done in the mode and according to the form which the law prescribed. Her acknowledgment had to be made to an officer, qualified by the law to take it, to whom she was personally known to be the person whose name was subscribed to the conveyance, as a party thereto, or proved to be such by a credible witness; and upon being made acquainted with the contents of the instrument subscribed by her, she was required to acknowledge, on an examination separate and apart from and without the hearing of her husband, that she executed the conveyance freely and voluntarily, without fear or compulsion, or undue

<sup>1</sup> Leonis v. Lazzarovich, 55 Cal. 52, 59. See Mathews v. Davis, 102 Cal. 202.

<sup>2</sup> Wedel v. Herman, 59 Cal. 507.

influence of her husband, and that she did not wish to retract the execution of the same. In construing the provisions of the statute, the supreme court regarded a married woman *quoad* her separate property as a *feme sole*, with power to dispose of her property, whether real or personal, in the mode prescribed, but in no other. Accordingly, they held that not only signing and acknowledgment by her of the execution of a conveyance, according to the statute, before an officer qualified by law to take the acknowledgment, but the certification by the officer of the execution and acknowledgment of the conveyance were each and all necessary parts of the conveyance; and that any instrument in writing purporting to convey her real or personal separate property, which was not acknowledged and certified, or which was defectively acknowledged and certified, was absolutely void—a piece of blank paper, which could not be corrected or reformed, in any particular, in a court of chancery, ‘because,’ says the court, ‘her consent to contracts must be perfectly free. She can make no contract to bind her, except in the manner prescribed by law. The provisions of the statute must be strictly pursued.’”<sup>1</sup> The learned justice then referred to certain sections of the Civil Code, bearing upon the conveyances of married women, and proceeded to say: “But the legal effect of these forms of procedure was changed. Joint execution of a conveyance by the husband and wife, and a separate acknowledgment by each, according to the forms prescribed, were still required for the disposition of her estate. But execution, acknowledgment, *and* certification of acknowledgment were no longer necessary to the validity of her conveyance. It was sufficient to pass her estate if she executed and acknowledged a conveyance thereof, according to the requirements of the Civil Code.”<sup>2</sup> When thus executed and acknowledged, her conveyance

<sup>1</sup> Citing *Barrett v. Tewksbury*, 9 Cal. 14; *Selover v. Russian American Com. Co.*, 7 Cal. 267.

<sup>2</sup> Civil Code, § 1093.

had the same effect as the deed of a *feme sole*.<sup>1</sup> Therefore, the certificate of acknowledgment is not an essential part of her conveyance. That, under the codes, is regarded simply as record proof of the fact of acknowledgment. Where acknowledgment has been made, according to law, before an officer qualified by law to take it, the party making it has done all that the law requires to make the instrument her act and deed. Her deed thus executed and acknowledged may be valid, though defectively certified. The embodiment of the fact of acknowledgment, in the form of the certificate prescribed by law, devolves upon the officer who has taken the proof of it, and not upon the party making it." The court held under a section of the Civil Code, which provides that when an instrument has been properly acknowledged, but defectively certified, the court may correct the certificate, that the certificate of acknowledgment of a married woman was within the purview of the statute; and that a defect in her certificate of acknowledgment might, by a judgment, be rectified.<sup>2</sup> But a defective certificate of

<sup>1</sup> Civil Code, § 1187.

<sup>2</sup> See Civil Code, § 1202. The court said that the case of *Leonis v. Lazzarovich*, 55 Cal. 52, was not in conflict with the views expressed, and observed: "Every judgment of every court must, of course, be considered with reference to the facts which were before the court for determination. In the facts and the principles of law applicable to them, the two cases are entirely dissimilar. In that case the object of the action was to control an alleged mistake in the deed of a married woman. The deed had been duly executed, acknowledged, and the court held, that it could not be reformed by adding to it any other property than what was described in it, because a married woman cannot be divested of her real estate, except in the mode prescribed by the codes. Therefore, the judgment of the lower court, directing a married woman defendant, to execute and acknowledge within a certain time, another deed conveying other lands than those described in her original deed, was adjudged erroneous. Certain expressions in the opinion as to the power of the court to correct a defective certificate of acknowledgment to such a deed, though sustained by authorities of other States, and by the decisions in our own State prior to the adoption of the codes, went beyond the facts of the case, and are not applicable to the facts of this case; for in this, the execution and acknowledgment of the conveyance were complete but the certificate of the officer was defective." And see *Durfee v. Garvey*, 65 Cal. 406.

acknowledgment of the deed of a married woman cannot be corrected under this provision of the code, when the defective certificate was made prior to the enactment of the code.<sup>1</sup>

§ 550. **Comments.**—In the case of *Wedel v. Herman*,<sup>2</sup> the question before the court was whether a defective certificate of acknowledgment of a married woman could be corrected. The right to have the defect rectified was based upon a provision of the code, which declares: "When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate."<sup>3</sup> The court held that a certificate of acknowledgment of a married woman might be corrected under this section. It, however, conceded that an acknowledgment was still necessary to the validity of a married woman's conveyance, but decided that a proper certification of it was not. Some interesting questions may arise under this view of the law. Suppose that a deed of a married woman had been in fact properly acknowledged, but the acknowledgment is defectively certified, and it becomes necessary to introduce this deed in evidence as one of the links in the chain of title. Presumptively the certificate states the truth. If the statement of any material fact is omitted, the presumption is that it did not occur. If, for instance, the deed was acknowledged by a married woman as though she were a *feme sole*, it would convey no title, as recently decided by the supreme court of that State.<sup>4</sup> Now, in the case supposed, could the party seeking to introduce the defectively certified deed in evidence prove, in a case in which the married woman was not a party, for the purpose of rendering it admissible, that it was properly acknowledged? It may be plausibly urged that he could. That the deed as between the parties and all the world, except *bona fide* purchasers in good faith, without notice,

<sup>1</sup> *Judson v. Porter*, 53 Cal. 482.

<sup>2</sup> 59 Cal. 507.

<sup>3</sup> Civil Code Cal. § 1202.

<sup>4</sup> *Durfee v. Garvey*, 65 Cal. 408.

is valid, is the conclusion reached in *Wedel v. Herman*. This being assumed, it may be said that the certificate of acknowledgment is to be treated simply as one mode of proof of its execution, and that if the certificate is defective, its execution may be proved by other means. But it is conceived that this cannot be done. If such a practice were permitted, aside from other objections to it, the title of a married woman might be divested without her consent in a case to which she was not a party. Under the section quoted, her deed would be inadmissible in evidence, in our opinion, until the defective certificate had been corrected by the judgment of a competent court.<sup>1</sup>

§ 551. *Separate examination of wife.*—In most of the States, the statute relating to acknowledgments requires that there shall be a private and separate examination of the wife. The general rule under these statutes, is, that the certificate of acknowledgment must show the fact of such private examination, or it will be void.<sup>2</sup> Ac-

<sup>1</sup> In *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, it was said, *arguendo*: "The contention of the plaintiff that the deed was delivered when Mrs. Bailhache signed it in the presence of the notary, and silently passed it to Bloom, cannot be successfully maintained; for although signed, the deed was not acknowledged and certified according to law; and until the deed of a married woman is acknowledged and certified according to the formalities prescribed by sections 1186 and 1191 of the Civil Code, it has no validity, and is not in a condition to be delivered or accepted."

<sup>2</sup> *Kendall v. Miller*, 9 Cal. 591; *McMullen v. Eagan*, 21 W. Va. 233; *Selover v. Russian Am. Com. Co.*, 7 Cal. 266; *Sibley v. Johnson*, 1 Mich. 380; *Jourdan v. Jourdan*, 9 Serg. & R. 268; 11 Am. Dec. 724; *McLeran v. Benton*, 43 Cal. 467; *Laidley v. Knight*, 23 W. Va. 735; *Pratt v. Battels*, 28 Vt. 685; *Graham v. Long*, 65 Pa. St. 386; *Watson v. Michael*, 21 W. Va. 568; *Steele v. Lewis*, 1 Mon. 48; *Clayton v. Rose*, 87 N. C. 106; *Phillips v. Green*, 3 Marsh. A. K. 7; 13 Am. Dec. 124; *Harty v. Ladd*, 3 Or. 353; *Bagby v. Emerson*, 79 Mo. 139; *Clayton v. Rose*, 87 N. C. 106; *Garrett v. Moss*, 22 Ill. 363; *Tate v. Stoolzfoos*, 16 Serg. & R. 35; 16 Am. Dec. 546; *Edgerton v. Jones*, 10 Minn. 427; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Lyon v. Kain*, 38 Ill. 362; *Rice v. Peacock*, 37 Tex. 392; *Stillwell v. Adams*, 29 Ark. 346; *Shryock v. Cannon*, 39 Ark. 434; *Hartley v. Ferrell*, 9 Fla. 374; *Muir v. Galloway*, 61 Cal. 498; *Linn v. Patton*, 10 W. Va. 187; *Laughlin v. Fream*, 14 W. Va. 322; *Krieger v. Crocker*, 118 Mo. 531; *Wambole v. Foote*, 2 Dak. 1; *First Nat. Bank v. Paul*, 75 Va. 594; 40 Am. Rep. 740; *Bryan v. Stump*, 8

cordingly, where a certificate of a married woman recited that she appeared before the officer "and acknowledged herself party to the annexed deed of trust, and being examined and apart from her husband, acknowledged that she signed, sealed, and delivered the same for the purposes and consideration therein expressed, and that she wished not to retract it," the certificate was held defective and worthless, because it failed to show that she was examined separate and apart from her husband, or the person by whom she was examined. All the recitals contained in the instrument may have been true, and yet they were not inconsistent with the idea that she might have never acknowledged to the officer her willingness to sign the instrument.<sup>1</sup> So in West Virginia, the certificate of the

Gratt. 241; 58 Am. Dec. 139; Nippel v. Hammond, 4 Col. 211; Trustees v. Davidson, 65 Ill. 124; Lyon v. Kain, 36 Ill. 362; Hayes v. Frey, 54 Wis. 503; McCandless v. Engle, 51 Pa. St. 309; Graham v. Long, 65 Pa. St. 383. See Ellett v. Richardson, 9 Baxt. (Tenn.) 293.

<sup>1</sup> Rice v. Peacock, 37 Tex. 392. In Jourdan v. Jourdan, 9 Serg. & R. 268, 11 Am. Dec. 724, the opinion of the court was delivered by Tilghman, C. J., who said: "This deed was acknowledged by both the grantors before James M. Gibbons, a justice of the peace of Chester county, as appeared by his certificate; but it did not appear that the wife was examined separate and apart from her husband, and that was the reason of the rejection. As to the acknowledgment of deeds by married women, the principle now firmly established is, that the requisites of the act of assembly by which the mode of conveyance by *femes covert* is prescribed must appear to have been substantially complied with on the face of the certificate made by the magistrate by whom the acknowledgment was taken: Watson v. Bailey is the leading case, 1 Binn. 470; 2 Am. Dec. 462; since which have been the cases of McIntire v. Ward, 5 Binn. 296; 6 Am. Dec. 417; Shaller v. Brand, 6 Binn. 435; 6 Am. Dec. 482; Evans v. Commonwealth, 4 Serg. & R. 232; 8 Am. Dec. 711; Watson v. Mercer, 6 Serg. & R. 49; 9 Am. Dec. 411, and Hopkins v. Birchall, 6 Serg. & R. 143. And in conformity with this principle, the counsel for the defendant has contended that it substantially appears the wife was examined separate and apart from her husband, because it is certified by the magistrate that she voluntarily consented, which she could not do if her husband were present, because then it would be presumed that she was under coercion. This argument is too refined. A separate examination is essential, and ought sufficiently to appear. In the present instance, the magistrate certifies that the *feme* voluntarily consented. We are to understand by that, that being asked by the magistrate whether she made her acknowledgment of her own free will, without any coercion or compulsion of her husband, she answered in the affirmative. Nothing



notary stated that "personally appeared before me, the undersigned notary public for said county, Abby Tream, the wife of said J. Tream, whose names are signed to the foregoing assignment, and being by me, in accordance with the law in that case, made and provided, and having the said writing fully explained to her, she acknowledged the same to be her act and deed for the purposes therein specified and set forth, and that she wished not to retract it." The certificate, because it did not show that she was examined privily and apart from her husband, and her willingness to execute the same,

more can be fairly implied. Whether this examination was in the presence of her husband or not does not appear; nor is there any ground for inference on that point. It might in truth be that she freely consented though her husband was present. But that will not satisfy the law. Examine the woman how you will, it is impossible to ascertain with certainty whether she gives her free consent; her word must be taken for that. She may, in fact, be under terror, though she be examined in the absence of her husband. But there is a better chance for her speaking her real sentiments in his absence than in his presence. And it is difficult for the law to protect her further than by giving her an opportunity of disclosing her mind to the magistrate, out of the presence of her husband. The act, therefore directs this examination of the wife to be separate and apart from her husband; and in this the magistrate has no discretion. He has no right to say that the consent was voluntary, unless the husband and wife were separate, and that they were separate must appear on the face of the certificate, and not otherwise. I am, therefore, of opinion that the certificate of acknowledgment was defective. But it was attempted to supply this defect by the parol evidence of the magistrate, before whom the acknowledgment was made. This evidence was also rejected, and, in my opinion, with great propriety. That point was expressly decided in the case of *Watson v. Bailey*, 1 Binn. 470; 2 Am. Dec. 462. In that case, the certificate of the magistrate was defective, and in order to supply the defect, parol evidence was offered and refused by the court. There would be no certainty in titles if this kind of evidence were permitted. The deed in question was acknowledged the 31st of December, 1802, and after the lapse of twenty years the magistrate is called upon to declare what took place at the time of the acknowledgment. If it were a new point, I should say that the evidence ought not to be admitted. The law directs the magistrate to make his certificate in writing, and he has made it. To that the world is to look, and to nothing else. But the point is not new. The decision in *Watson v. Bailey* has been recognized in other cases. There can be no hesitation, therefore, in saying that in the present instance, the parol evidence was inadmissible."



was held fatally defective.<sup>1</sup> Speaking of a certificate of acknowledgment, Mr. Justice Breese said: "It fails to state that the officer acquainted her with, and explained to her, its contents, or that he examined her separate and apart from her husband, or that she acknowledged that she executed it voluntarily and freely, and without the compulsion of her husband. Each of these things is an essential prerequisite to pass the title of a married woman's land, and cannot be omitted. The statute requires them, and, until they are performed, the deed as to a *feme covert* is inoperative and void. It is by the authority of the statute alone that she can convey her real estate, and a compliance with it is essential to give to it validity."<sup>2</sup> Where the certificate of acknowledgment shows that the privy examination of a married woman was not taken as required by statute, she is, where the right to dower exists, entitled to recover, on the death of her husband, her dower in the real estate conveyed in the deed.<sup>3</sup> The acknowledgment should be made after the examination and explanation. It is not sufficient that she acknowledged the deed with her husband, and it was subsequently fully explained to her, and she declared that she had executed it voluntarily and did not desire to retract it.<sup>4</sup>

§ 552. Examination is private if husband is excluded. Some controversy has arisen over what is meant by

<sup>1</sup> Laughlin v. Tream, 14 W. Va. 322. See, also, Grove v. Zumbro, 14 Gratt. 501; Linn v. Patton, 10 W. Va. 198; Laidley v. Knight, 23 W. Va. 735; Bartlett v. Fleming, 3 W. Va. 165; Hairston v. Randolph, 12 Leigh, 445; Leftwich v. Neal, 7 W. Va. 569; Harvey v. Peck, 1 Munf. 518.

<sup>2</sup> Garrett v. Moss, 22 Ill. 363, 364; Elliot v. Peirsol, 1 Peters, 328; Board of Trustees v. Davison, 65 Ill. 124; Healy v. Rowan, 5 Gratt. 414; 52 Am. Dec. 94; Stillwell v. Adams, 29 Ark. 346; Jordan v. Corey, 2 Ind. 385; 52 Am. Dec. 516; McCann v. Edwards, 6 Mon. B. 208; Dewey v. Campau, 4 Mich. 565; Russ v. Wingate, 30 Miss. 440; Den ex. dem. Etheridge v. Ashbee, 9 Ired. 353; Willis v. Gattman, 53 Miss. 721; Warren v. Brown, 25 Miss. 66; 57 Am. Dec. 191.

<sup>3</sup> First Nat. Bank v. Paul, 75 Va. 594; 40 Am. Rep. 740.

<sup>4</sup> McMullen v. Eagan, 21 W. Va. 233; Watson v. Michael, 21 W. Va. 568.

a private examination. It has been contended that a private examination signifies that not only the husband but all other persons should be excluded when this examination occurs. And in one case it was decided that the examination would be vitiated, if any other person than the officer and the wife were present, for such examination, it was said, would not be private.<sup>1</sup> But shortly after, in the same court, this question received the most careful examination and consideration, and this case, after a re-examination, was overruled, the court observing: "It appears to be almost universally held that a literal conformity to the words of the statute in such cases is not required, and that if the requisites are substantially complied with, it is sufficient. What, then, is a substantial compliance with the statute? In order to settle this, we must consider what particular evil was intended to be prevented, and what object was intended to be promoted. There is no difficulty in declaring that the object intended to be promoted was the free, voluntary, and unconstrained act of the wife; and that the evil intended to be obviated was the undue influence of the husband. It was presumed that his presence imposed constraint upon her, and that influence was intended to be removed by placing her out of its immediate operation, and where she would be presumed to act 'freely, voluntarily, and without any fear, threats, or compulsion of her husband.' The undue influence of others does not appear to have been contemplated, nor does it seem to have been in the mind of the legislature that the influence of the husband might be excited through other persons present at the examination; for had this been the case, the pro-

<sup>1</sup> Warren v. Brown, 25 Miss. 66, 57 Am. Dec. 191. "The acknowledgment made by the complainant," said the court, "is not in accordance with the statute, but is defective in an essential particular. It is true that it states that it was made 'separate and apart from the husband,' but it does not purport to have been made on 'a private examination.' This is as essential a requisition of the statute as an examination 'apart from the husband.' For it will be readily seen that the objects of the statute might be as easily defeated, if the examination was not made in private, as if made in the presence of the husband."

vision doubtless would have been 'apart from her husband' and all other persons. Great force is given to this view, when we refer to what she is required by the statute to acknowledge, and which has reference entirely to her husband, namely, that she acted 'without fear, threats, or compulsion of her husband.' But it is urged that the terms of the statute require that it should be shown that her examination was both private and apart from her husband; that these terms were employed *ex industria*; that they are significant and must be complied with; and that the statute must be construed so as to give effect to all the words used. But words are to be construed with reference to the whole statute, its general scope and object, and the particular evil intended to be provided against; and the terms used must yield to the obvious intention to be collected from the whole act. We have above adverted to the evil intended to be prevented, and the reasons of this statute. Keeping these objects in view, what, then, are we to understand by the words 'private examination'? If it was intended that it should be out of the presence of all persons whatever, the words 'apart from her husband' become useless, for that was already embraced by the words 'private examination' under the construction contended for. Suppose the words 'apart from her husband' were omitted, can we attach any definite and practical understanding to the words 'private examination'? Do they necessarily exclude the husband's presence, and if they do not, as is most certainly true, do they necessarily exclude the presence of all other persons? If not, what number and character of persons may be present, and still the examination be 'private'? These considerations present great difficulties in deducing any practical rule from the statute upon the construction contended for. And these difficulties can only be avoided by applying the reason of the statute in its exposition. Otherwise it is vague and impracticable. That reason, manifestly, has reference only to the presence, and the presumed influence of the husband. When,

therefore, the statute provides that the wife shall make the acknowledgment on a 'private examination,' 'apart from her husband,' the latter clause was intended merely to explain and define what was meant by the words 'private examination,' which were too general and uncertain for any practical purpose. The substantial thing required to be done by her was to declare that she acted 'freely, without any fear, threats, or compulsion of her husband,' and this out of his presence, and apart from all liability to his constraint."<sup>1</sup> The rule is now generally understood as requiring that the husband is the only person who need be excluded from the examination. The presence of other persons does not make the examination less private.<sup>2</sup>

§ 553. *Comments.*—It has been generally assumed that all that the statute requires is, that the examination shall be separate and apart from the husband, and the very infrequency with which the question has been raised shows that this has been the practical construction placed upon the statute. The word "private" is qualified by the words "apart from her husband." If this construction were not to be adopted, it would be useless to employ the words "apart from her husband," as the term "private," in excluding all, would necessarily exclude the husband among the rest. That an influence of coercion might be exerted by a third party is not contemplated by the statute, the design of which is to secure the wife from the control or interference of her husband only. In fact, to the objection that an improper influence might be exerted by a third party, if allowed to be present, it may be answered that the examining officer may as readily be

<sup>1</sup> *Love v. Taylor*, 28 Miss. 567, 575, per Handy, J. If there is a defect in the certificate of acknowledgment, a proper acknowledgment made after a conveyance to a second grantee will not cure the defect: *Durfee v. Gawey*, 65 Cal. 406; *Enterprise Co. v. Sheedy*, 103 Pa. St. 492; 49 Am. Rep. 130.

<sup>2</sup> *Dennis v. Tarpenny*, 20 Barb. 371; *Thayer v. Torry*, 37 N. J. L. 339. And see *Den v. Geiger*, 4 Halst. 233; *Nanty v. Bailey*, 3 Dana, 111. See, also, *Kenneday v. Price*, 57 Miss. 771; *Coombes v. Thomas*, 57 Tex. 321; *Belo v. Mayes*, 79 Mo. 67.

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supposed to use intimidation. The law considers the wife sufficiently protected if she is examined where her husband can exercise no control over her will.

**§ 554. Husband must not be able to hear examination.**—As the whole law relating to the acknowledgments of married women depends upon the supposition that the husband will unduly influence the wife, it follows that to make the examination the private one intended by statute, she must be free from all visible compulsion on his part. The acknowledgment must be taken out of his presence, where he cannot see or hear any indication of unwillingness which she may manifest in executing or acknowledging the instrument. If this be not done, she is not afforded an opportunity to escape the coercion against which the law attempts to guard her.<sup>1</sup> And where a married woman objects to executing a deed, and her husband then speaks to her in threatening and abusive language, though the officer is not present, and immediately thereafter in her husband's presence she acknowledges the conveyance to be her voluntary act, it is held that the presence of her husband is coercive. In such a case the instrument is ineffectual to pass her title, as the acknowledgment is not taken apart from her husband.<sup>2</sup> The husband should be so far away that he cannot communicate to the wife by word, look, or motion.<sup>3</sup>

**§ 555. Construction of particular certificates.**—Where a statute of Maryland required that a married woman

<sup>1</sup> *McCandless v. Engle*, 51 Pa. St. 309.

<sup>2</sup> *Edgerton v. Jones*, 10 Minn. 427. "Whatever other or further construction," said the court, "it may be necessary in a proper case to put upon the statute, it is clear that the object was to secure to the wife freedom of action, especially from the influence of her husband, in executing deeds of real property. We are clear that in this case his presence under the circumstances was not permitted by the statute. It was a coercive presence."

<sup>3</sup> *Belo v. Mayes*, 79 Mo. 67. A command of the husband may not amount to duress: *Gabbey v. Forgeus*, 38 Kan. 62. See, also, *Gardner v. Case*, 111 Ind. 494; *Green v. Scranage*, 19 Iowa, 461; 87 Am. Dec. 447; *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108.

should be examined "out of the presence" of her husband, it was held by the Supreme Court of the United States that a certificate that she was "privately examined apart from and out of the hearing of her husband," was a sufficient compliance with the statute. "Now, although the words 'out of the presence' are not used here," said Mr. Justice Miller, "we are of opinion that the words which are used show necessarily and conclusively that the examination was had out of the presence of the husband. In the first place, it was had *privately*. As the object of the statute was not to provide for strict privacy from all persons, but only privacy from the husband, it is to be supposed that it was in this sense the justices used the word. It is also stated that she was examined *apart* from her husband. This expression is still stronger, and can mean nothing less than that the husband was not present when she was examined; and to make it still clearer that this examination, private and apart from her husband, was out of his presence, it is further certified that it was out of his hearing. Some decisions of the Supreme Court of Maryland have been cited to show that the rule there is a strict one as to the agreement between the certificate and the statute, but none which overturns the doctrine recognized by that court, as it has been by all others, that equivalent words, or words which convey the same meaning, may be used instead of those to be found in the statute."<sup>1</sup> In Colorado, the statute provides that the officer taking the acknowledgment of a married woman shall certify "that the same was made upon examination separate and apart from, and out of the presence of the husband of such woman; that the contents, meaning, and effect of such deed were by him fully explained to her."<sup>2</sup> The certificate declared that the wife "having been by me examined separate and apart, and out of hearing of her husband, and the contents and meaning of said trust deed having been by me made known, and fully explained to her, acknowledged that she had fully and voluntarily

<sup>1</sup> Deery v. Cray, 5 Wall. 795, 807.<sup>2</sup> Rev. Stats. Col. p. 111, § 17.

executed the same." It will be noticed that the officer uses the words "out of hearing," instead of those in the statute, "out of the presence," and omits the word "effect" contained in the statute, after the words "contents and meaning." But it was held that the certificate substantially complied with the law, and was sufficient.<sup>1</sup> Where it is required that she should be examined "privily and apart from her husband," a certificate that the commissioner took "the private examination," and that she acknowledged that "she executed the deed without any compulsion from her husband, or any other person," is regarded as sufficient.<sup>2</sup> A certificate of acknowledgment after reciting the appearance of the wife continued, "who, after a private examination, separate and apart from her said husband, acknowledges that she signed, sealed, and delivered the foregoing deed as her voluntary act, freely and for the purposes therein expressed, without any fear, threat, or compulsion of her said husband." To this certificate the objection was made, that although it stated that the wife *was examined* separately, yet it did not state that she *acknowledged* the instrument separately. But the

<sup>1</sup> *Nippel v. Hammond*, 4 Col. 211. The court, per Thatcher, C. J. said: "Is the omission of the words 'out of the presence of' fatal to the acknowledgment? There must be a *substantial*, though not necessarily a literal compliance with the statute. If the substituted words employed, considered in connection with the entire acknowledgment, do not reasonably import that Mrs. Bohlscheid was examined 'out of the presence' of her husband, the acknowledgment would be insufficient. Within the intent of the section just quoted the words 'separate and apart from' evidently include in their meaning 'out of the presence.' The section, in terms, declares that the married woman shall *acknowledge* the deed 'separate and apart from her husband,' omitting the words 'out of the presence.' That the legislature intended by this language that the acknowledgment should be taken in the absence of the husband, is apparent from the subsequent part of the section which directs that the officer taking such acknowledgment shall certify that the same *was made upon examination, separate and apart from, and out of the presence of, the husband.* By no rational construction can it be said that when a husband is in the presence of his wife, that she is separate and apart from him."

<sup>2</sup> *Skinner v. Fletcher*, 1 Ired. 313.



court characterized the objection as hypercritical, and held the certificate sufficient.<sup>1</sup>

§ 556. **Presumption of private examination.**— Under some of the early statutes, all that the officer was required to certify was the fact of acknowledgment, and although he was compelled to examine the wife separately and apart from her husband, and to explain to her the full contents of the deed, yet it was not necessary that these facts should affirmatively appear from his certificate. Under these statutes, it would be presumed that he did his duty, and complied with these requirements of the statute, without a statement that he did so.<sup>2</sup> In Indiana, with reference to the statute in force, when the acknowledgment was made, it was said: "It is the officer's duty, by this statute, before he takes the acknowledgment of a *feme covert*, to examine her apart from her husband, and make known to her the contents of the deed; and if, upon such examination, she declares, either expressly or in language implying it, that she had executed the deed voluntarily, etc., the officer must, under his hand and seal, and on the deed, certify the same; that is, he must certify that such declaration or acknowledgment of the voluntary execution of the deed was made before him. But the statute does not require, as we understand it, the certificate to show anything more on the subject than the declaration or acknowledgment of the wife that she had voluntarily executed the deed. It will be presumed, the contrary not appearing, that the officer did his duty as

<sup>1</sup> *Kenneday v. Price*, 57 Miss. 771. And see *Bernard v. Elder*, 50 Miss. 336, where a certificate of acknowledgment omitting the words "as her voluntary act and deed," "freely," but containing the words "fear, threats, or compulsion of husband," was held sufficient. See, also, *Pardun v. Dobesberger*, 3 Ind. 389; *Webster's Lessee v. Hall*, 2 Har. & McH. 19; 1 Am. Dec. 370.

<sup>2</sup> *Coleman v. Billings*, 89 Ill. 183; *Hughes v. Lane*, 11 Ill. 123; 50 Am. Dec. 436; *Russell v. Administrators of Whiteside*, 4 Scam. 7; *Jordan v. Corey*, 2 Ind. 385; 52 Am. Dec. 516; *Fleming v. Potter*, 14 Ind. 486; *Ruffner v. McLennan*, 16 Ohio, 639. And see *Allen v. Reynolds*, 4 Jones & S. (36 N. Y. Sup. Ct.) 297.



to the separate examination of the wife, and making her acquainted with the contents of the deed. It is the acknowledgment only, not the circumstances under which it was made, that is required to be certified."<sup>1</sup>

§ 557. **Comments.**—The decisions referred to in the preceding section were based on special statutes, which, in the opinion of the court, required the officer to certify nothing more than the mere fact of acknowledgment, and under which it would be presumed that all antecedent acts had been duly performed. They do not, therefore, impugn the general rule that the certificate of acknowledgment must show on its face, either by using the words of the statute or other equivalent expressions, every act essential to its validity. Every essential act that is not made by the certificate to appear will, as we understand the law, be presumed not to have occurred.

§ 558. **Identity should appear.**—The general rule, of course, prevails in reference to the certificates of married women, that it should appear that she was known to the officer taking the acknowledgment.<sup>2</sup> A certificate of acknowledgment declared that the husband was personally known to the officer, and also that his wife appeared and acknowledged the deed. But the certificate did not state that she was personally known to the officer. A majority of the court held that the acknowledgment was insufficient. "A deed cannot be said to be acknowledged," said Mr. Justice Walker, in delivering the opinion of the court, "until it appears that it was the grantor himself, and not some person who may have personated him, who was before the officer and made the acknowledgment. This provision is wise and salutary in its operation. If no such requirement existed, forgeries would be easily perpetrated, and it would be hard in all

<sup>1</sup> *Stevens v. Doe*, 6 Blackf. 475, 476.

<sup>2</sup> *Reynolds v. Kingsbury*, 15 Iowa, 238; *Gove v. Cather*, 23 Ill. 634; 76 Am. Dec. 711; *Lindley v. Smith*, 46 Ill. 523. But see *Mount v. Kesterson*, 6 Cold. 452.

cases, and impossible in many, to prove the fact. Remove this safeguard, and titles to real estate would be held by a slender and brittle tenure.”<sup>1</sup> Chief Justice Breese, however, dissented from the opinion of the majority of the court, and said: “I think the statutory form of acknowledgment has been substantially complied with, as the magistrate certified the husband was personally known to him, and his wife appeared and acknowledged the deed. And it is impossible he could certify she was the wife if he did not personally know her. The former includes the latter, and makes the acknowledgment a substantial compliance with the statute, which is all that is necessary. The objection is very technical, and defeats the right.”<sup>2</sup> We think the opinion of the majority of the court founded on the soundest reason. It is true there is some ground for the assertion that the objection is technical. But so, perhaps, is every objection that a certificate of acknowledgment is defective. It is always dangerous to attempt to supply material matters by construction, and the rule ought not to be carried further than is necessary. Where the certificate omitted the name of the wife altogether, so that it read: “And the

<sup>1</sup> *Lindley v. Smith*, 46 Ill. 523, 527.

<sup>2</sup> *Lindley v. Smith*, *supra*. In that case the certificate was in the following form: “State of Illinois, Clark County, ss. I, William C. Whitlock, a justice of the peace in and for the said county, in the State aforesaid, do hereby certify that Joseph Hollenbeck, personally known to me as the same person whose name is subscribed to the foregoing warranty deed, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth. And the said Hannah M. Hollenbeck, wife of said Joseph M. Hollenbeck, having been by me examined separate and apart, and out of the hearing of her husband, and the contents and meaning of the said instrument in writing having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, without compulsion of her said husband, and that she does not wish to retract the same. Given under my hand and seal this fourteenth day of January, A. D. 1859.” That the fact that the person is known to the officer is required to be stated, see *Tully v. Davis*, 30 Ill. 103; 83 Am. Dec. 179; *Shepherd v. Carrel*, 19 Ill. 313; *Adams v. Bishop*, 19 Ill. 395.

said ———, wife of said ———, having been by me examined," etc., it was held that the certificate was defective, and that the deed could not be received in evidence.<sup>1</sup>

§ 559. *Statement of wish not to retract.*—The statutes relative to the acknowledgment of deeds by married women generally require that she should state that she does not wish to retract the execution of the deed. She has even at the very last moment still the right of retraction if she is not perfectly satisfied. Whenever the statute contains a provision of this character, the certificate must show that she stated that she did not wish to retract.<sup>2</sup> In a case in Virginia, Mr. Justice Moncure speaks of the necessity of this statement appearing, and says: "This certificate wholly omits any declaration of the wife that she *wishes not to retract* what she had done, and contains nothing which tends to show that she made any such declaration. Her wish to retract what she had done is perfectly consistent with everything contained in the certificate. The law, as we have seen, expressed this declaration to be made and entered of record, and the requisition is very material. I am, therefore, compelled to say that in my opinion the certificate is fatally defective in this respect, and that the privy examination and acknowledgment of the wife were not duly taken."<sup>3</sup> A certificate, after stating that the wife acknowledged the deed, proceeded to declare "and that she does not wish to *contract* the same." The court held that the mistake obviously appeared that the word "contract" was written for "retract," and that it did not affect the certificate.<sup>4</sup>

<sup>1</sup> *Merritt v. Yates*, 71 Ill. 636; 22 Am. Rep. 128. See, also, *Coburn v. Herrington*, 114 Ill. 104.

<sup>2</sup> *Landers v. Bolton*, 26 Cal. 393, 408; *Belcher v. Weaver*, 46 Tex. 293; 26 Am. Rep. 267; *Linn v. Patton*, 10 W. Va. 187; *Bateman's Petition*, 11 R. I. 585; *Ruleman v. Pritchett*, 56 Tex. 482; *Davis v. Agnew*, 67 Tex. 206; *Burkett v. Scarborough*, 59 Tex. 496; *Churchill v. Monroe*, 1 R. I. 20; *Blair v. Sayre*, 29 W. Va. 604; *Bolling v. Teel*, 76 Va. 487; *Laidley v. Central Land Co.*, 30 W. Va. 505.

<sup>3</sup> *Grove v. Zumbro*, 14 Gratt. 501, 516. See, also, *Chauvin v. Wagner*, 18 Mo. 531; *Le Bourgeoise v. McNamara*, 5 Mo. App. 576, appendix.

<sup>4</sup> *Belcher v. Weaver*, 46 Tex. 293, 297; 26 Am. Rep. 267.

In Ohio, the statute provided that if a married woman, after the contents of the deed are explained to her, shall, upon her separate examination, "declare that she did voluntary sign, seal, and acknowledge the same, and that she is still satisfied therewith, such officer shall certify such examination and declaration of the wife, together with the acknowledgment as aforesaid on such deed." Under this statute, it was held that a certificate of acknowledgment which omitted the statement "that she is still satisfied therewith," is defective.<sup>1</sup> In Rhode Island, the

<sup>1</sup> *Ward v. McIntosh*, 12 Ohio St. 231. In this case, Peck, J., delivered the opinion of the court, and said: "At common law the wife could not, during coverture, transfer her interest in real estate, by any ordinary conveyance, and this *enabling* statute only authorizes its being done, under certain guards and restrictions, designed to obviate any undue influence or persuasion of the husband, and leave her free and untrammelled. It would seem, therefore, that every precaution which the statute enjoins should be substantially complied with before an instrument executed by her shall have the effect of encumbering or divesting her estate. Prominent among these safeguards is the provision requiring a declaration by the wife to the officer taking the acknowledgment, in the absence of the husband, and after explanation of the effect of the instrument, not only that she did voluntarily sign, seal, and acknowledge it, which was substantially complied with in the above certificate, but also that *she is still satisfied therewith*, and willing to part with the interest it purports to convey. The husband, without resorting to coercive measures, may induce a dependent and confiding wife to consent to a sacrifice of her true interests—a sacrifice to which she may have voluntarily, though reluctantly, consented. This provision was designed to confer upon a wife thus circumstanced a *locus penitentiae*—an opportunity to withdraw before becoming irrevocably bound. To this end, she is to be removed temporarily from the presence and direct influence of her husband, and informed of the legal effect of the instrument she has executed, and required to declare her continued satisfaction with or dissent from the projected contract. In view of the extraordinary influence which an embarrassed or unscrupulous husband may exercise over one in such intimate relations with him, such a provision seems eminently just and appropriate. . . . Courts have, certainly, gone great lengths in sustaining conveyances of married women, which have been defectively acknowledged. They were, no doubt, stimulated to do so by the fact that otherwise the parties aggrieved would be without remedy; but this is no longer true, as the constitution and the law at this day, in all proper cases, afford a remedy against such persons. A somewhat similar question arose in the States of Illinois and Missouri, under statutes of those States by which the deed of a *feme covert* is made obligatory upon her, if she, upon separate examination,

statute provided that the wife should be examined privily and apart from her husband, and should declare to the

shall acknowledge that she executed the deed voluntarily, etc., and does not wish to retract, the certificate failing to state that *she did not wish to retract*. In each of those States the courts were divided on the question whether a fair construction of the statutes, under which the acknowledgments were taken, required the officer to certify that she did not wish to retract; but all the judges seem to concur in holding that if it was so required, the objection would be fatal: *Hughes et al. v. Lane et al.*, 11 Ill. 123; 50 Am. Dec. 436; *Chauvin et al. v. Wagner*, 18 Mo. 531. The question which divided the courts of those States could not arise under our statute, which imperatively requires the declaration to be made, and if made, to be certified upon the deed itself. We are aware that the views here expressed are in conflict with the case of *Card v. Patterson*, 5 Ohio St. 319. In that case, which arose under the Act of 1831, a certificate by a justice of the peace, 'that the said Maria (the wife), being by me examined, separate from her husband, declared that she signed the same of her own free will and accord,' preceded by the joint acknowledgment of the deed by her and her husband, was held effective to transfer her interest in the lands conveyed. This certificate, it is true, varies from the certificate of *Mrs. McIntosh* in this, that it is preceded by a joint acknowledgment of husband and wife, and renders the inference that she thereby expressed her satisfaction, less forced than in the case at bar. Still it is not to be disguised that under our conceptions of the statute, the certificate was insufficient. The declaration of continued satisfaction to which we attach such importance does not appear to have been noticed by the court or the counsel managing the cause. The court refer to the statute of 1818, and the decisions under it, and the earlier laws, and after contrasting the certificate before them with one adjudged to be sufficient under the Act of 1818, in *Vattier v. Chesseldine*, 16 Ohio, 661, arrive at the conclusion 'that the certificate in question, under the adjudications of this court, substantially complies with the requirements of the Act of 1831.' None of the statutes under which the adjudications referred to were made, contain the same or any similar provision, it having been introduced for the first time into the Act of 1831, to protect the estates of married women from hasty and ill-advised alienations. While we entertain profound respect for the learning and ability of the court making the decision in that case, we are constrained to think it was decided upon its supposed analogy to adjudications under statutes essentially variant, and without properly estimating the change effected or intended to be effected by the Act of 1831. We are also sensible of the impolicy of disturbing decisions in reference to alienations of real estate; but we regard the decision in *Card v. Patterson* as a substantial repeal of an express statutory provision, and a majority of the court are fain to believe that a speedy retraction will be productive of less injustice than is likely to ensue from a blind adherence to a solitary decision made in direct contravention of the statute." But see, also, *Etheridge v. Ferebee*, 9 Ired. 312.

officer taking such acknowledgment that the deed shown and explained to her by the officer is her voluntary act, and that she does not wish to retract the same. A certificate of acknowledgment stated that the husband acknowledged the deed to be his voluntary act and deed, and the wife "being examined separately and apart from her husband, acknowledged the same before me." The court said that the fair construction of the language was that she was examined separate and apart from her husband in reference to the deed, but added: "The result of that examination is but imperfectly given, when it is added, she acknowledged the same. The object of the privy examination is not merely that she should declare to the magistrate that she had executed the deed, but that she might declare whether she had executed it freely, without constraint, and that it is, at the moment of examination, her free and voluntary act. The magistrate may have intended this by his certificate. But the question is not what the magistrate intended, but what the words of the certificate by fair construction expressly or necessarily imply. We cannot extend these words by construction, without taking for granted the very fact which it was the design of the statute that the magistrate should certify. But for this we may as well assume that the words imply that she acknowledged it to be an instrument executed by constraint, as that it was her free and voluntary act. The certificate, therefore, is insufficient as it stands, and cannot be extended by construction without taking for granted the fact which it was the intent of the statute that the certificate should ascertain, to wit, whether the deed was her willing or unwilling act at the time of taking the acknowledgment. It is upon the deed, as the present act of her will, that the statute emphatically insists, when it requires that she should declare that she doth not wish to retract the same."<sup>1</sup> In a later case in the same State, where the certificate omitted the statement of a wish not to retract,

<sup>1</sup> Churchill v. Moore, 1 R. I. 209, 211, per Durfee, C. J.

it was argued that it might be presumed that she did not after signing, change her mind. But the court responded: "Undoubtedly we may presume so, and yet the fact may be otherwise. And because it may be otherwise, the statute requires the more plenary proof afforded by the declaration. We have no right to dispense with so positive a requirement. . . . Of course, it is not necessary, however desirable it may be, for the certificate to follow the language of the statute. But it is necessary for it to show, either expressly or by intendment, that the acknowledgment or declaration prescribed has been given in substance if not in form."<sup>1</sup> But it is not essential that the officer should ask her in the words of the statute whether she wished to retract the deed, but it is sufficient if he brings out from her the fact that it is her present purpose voluntarily to execute the deed.<sup>2</sup>

§ 560. **Explanation of contents of deed.**—Another requirement generally found running through all the statutes is that the officer shall explain or make known to the married woman seeking to acknowledge the deed, the contents of the instrument. This is generally regarded as an essential requirement, and the fact of such explanation should be stated in the certificate. In a case in California, where the certificate of acknowledgment was defective in this respect, and where the wife was unable to write, Chief Justice Terry, in speaking of this provision of the statute, observed: "The legislature designed by these provisions to prevent the execution of any conveyance by a married woman from being procured by deceit or misrepresentation, and this object could be effectually accomplished only by requiring the instrument to be explained to her before being acknowledged, in order that the execution might be retracted if procured by improper influences. Under our law, no presumption of knowledge on the part of a married woman of the contents of a deed arises from the fact of executing it, and especially could

<sup>1</sup> Bateman's Petition, 11 R. I. 585, 587.

<sup>2</sup> Adams v. Pardue Tex. Civ. App. 36; S.W. Rep. 1015.



no such presumption arise in the present case, as it appears from the instrument itself that the wife was unable to write.”<sup>1</sup> This question was very elaborately discussed in a case that arose in Virginia, and the conclusion was reached that this requirement of the statute was indispensable to a valid acknowledgment, and a certificate which omitted to state that it had been done was defective.<sup>2</sup> Allen, J., said: “The certificate in the case under consideration varies from the form prescribed in several respects; but enough appears upon its face to show that the law was substantially complied with except in one particular; the justices do not certify that the deed was fully explained to the *feme*, nor is there anything in the certificate from which, in my opinion, we are authorized to infer that at the time of the acknowledgment of the deed she had knowledge of its contents. It has been argued with much ingenuity that, as it appears from the certificate that she had acknowledged that she had willingly executed said deed on her part, that implies a consent, and that she could not consent to that of which she was ignorant. The argument strikes me as more specious than sound. We can easily imagine that a wife might be readily brought to yield her consent to an act of this kind desired by her hus-

<sup>1</sup> In *Pease v. Barbiers*, 10 Cal. 436, 440. See, also, *Hutchinson v. Ainsworth*, 63 Cal. 286; *Langton v. Marshall*, 59 Tex. 296; *Morman v. Board*, 11 Bush, 135; *Burnett v. McOluey*, 78 Mo. 676; *Bateman's Petition*, 11 R. I. 585; *Bolling v. Teel*, 76 Va. 487; *Barnet v. Barnet*, 15 Serg. & R. 72; 16 Am. Dec. 516; *O'Ferrall v. Simplot*, 4 Greene G. 162; s. c. 4 Iowa, 381; *Ruleman v. Pritchett*, 56 Tex. 482; *Johnson v. Bryan*, 62 Tex. 623; *Norton v. Davis*, 83 Tex. 32; *Burkett v. Scarborough*, 59 Tex. 495; *Hayden v. Moffatt*, 74 Tex. 647; 15 Am. St. Rep. 866; *Johnson v. Taylor*, 60 Tex. 360; *Miller v. Wentworth*, 82 Pa. St. 280; *Spencer v. Reese*, 165 Pa. St. 158; *Hornbeck v. Mutual etc. Assn.*, 88 Pa. St. 64; *Roney v. Moss*, 76 Ala. 491; *Bagby v. Emberson*, 79 Mo. 139; *Tavener v. Barrett*, 21 W. Va. 656; *Bolling v. Teel*, 76 Va. 487. In *Barnet v. Barnet*, *supra*, it was said: “It does not appear by the certificate of this acknowledgment that the contents of the deed were made known to the wife, or that she did, in fact, know them. It has been expressly decided by this court that this is an incurable defect, and, therefore, the opinion of the court below was correct.”

<sup>2</sup> *Hairston v. Randolph*, 12 Leigh, 445.



band, though ignorant of its character. But with the plain requisitions of the statute before us, such speculations are unnecessary. At common law she could not convey. The statute points out a mode by which a valid conveyance may be made. It is an innovation on the common law, and its terms must be substantially complied with. By it, the certificate must in some form show, not only that she acknowledged the conveyance, and that she willingly signed, sealed, and delivered the same, and wished not to retract it, but that it was explained to her. The explanation is to be made that she may have knowledge of the contents; but if the acknowledgment implies consent, and consent implies knowledge, then the simple acknowledgment would have been sufficient, and the other requirements would be supererogatory. . . . Whilst a compliance with all the terms of the law is required to appear on the face of the certificate, we have a reasonable assurance that the leading object of the statute will be assured; that is, the providing the wife with an opportunity, after a full understanding of the nature of the act she is about to do, of exercising her own free will. The certificate in the present case does not, in terms, state that the deed was explained to the wife; and there is nothing on the face of it to the same effect which justifies the inference that it was explained, or that she had knowledge of the nature of the act she was doing; on the contrary, every word of the certificate may be true, and yet she may never have read the deed or heard its contents. Therefore, I think the certificate is defective and the deed not valid as to her." And Mr. Justice Cabell said: "In the case of a deed executed by a person not under the disability of coverture, the law infers, *prima facie*, that the party executing it had sufficient knowledge of the nature and effect of the deed, and that he acted freely and voluntarily. Therefore, nothing further is required than proof of the mere execution of the deed. But the law makes no such inference in the case of married women, who, being under the power and dominion of their husbands,

may be sometimes coerced to do that which they would not willingly do; and even where there is no coercion, they may be deceived as to the nature and effect of the act proposed to be done, by the representations of their husbands, in which they generally repose an unsuspecting confidence. To guard the wife against these dangers, the law is not satisfied with her mere acknowledgment of the deed. Such acknowledgment does not and ought not to imply that she acted either voluntarily or with proper knowledge. It may, in fact, have been made in terror of her husband, or in ignorance of the nature and effect of the deed. The law, therefore, has wisely ordained that, to give validity to the deed of a married woman, it must appear that in executing the deed she acted both understandingly and willingly. The certificate before us is fatally defective. It does not appear that Mrs. Randolph was acquainted with the nature and effect of the deed. The certificate does not state that the deed was explained to her by the justices; nor does it state any circumstance from which her knowledge of its contents can be fairly inferred."<sup>1</sup>

§ 560 a.    **Explanation to widow.**—The statutes requiring that the contents of a deed should be explained by the officer taking the acknowledgment of a married woman, apply only to *femes covert*. The object of such a provision of the statute is that she may understand what she is doing, and may act freely and voluntarily without influence from her husband. But where she has no husband to exercise this influence against which the law attempts to protect her, there is no reason for explaining the deed to her. Hence, it is unnecessary to explain a deed to a widow, and in a suit to set aside a deed claimed to have been obtained by undue influence, the fact that the officer failed to explain to her the contents of the deed cannot be admitted in evidence.<sup>2</sup>

<sup>1</sup> *Hairston v. Randolph, supra*; *Bolling v. Teel*, 76 Va. 487. But see *Tod v. Baylor*, 4 Leigh, 498.

<sup>2</sup> *Beville v. Jones*, 74 Tex. 148.

§ 561. **Explanation in presence of husband.**—It might seem that everything connected with the acknowledgment of a deed by a married woman should occur or be performed out of the presence of the husband. It has been so repeatedly said, that the acknowledgment is meant to take the place of the ancient fine, and that the law has thrown around the wife all the safeguards, to prevent any imposition or coercion on the part of her husband, that it would seem to follow, as a natural conclusion, that none of the elements of a perfect acknowledgment should be interfered with by the presence of her husband, who, the law generally presumes, will exercise an undue influence over her. But it has been decided that an explanation of the contents of the deed in the presence of the husband does not affect the acknowledgment.<sup>1</sup>

<sup>1</sup> *Moorman v. Board*, 11 Bush, 135. In that case it was said by Lindsay, J., who delivered the opinion of the court (p. 139): "The decided weight of the testimony is in favor of the conclusion that Board was not in the room, nor in sight of his wife at the time the clerk took the acknowledgment to the deed. Instead of contradicting the presumption of law that she was examined separately and apart from him, it rather supports said presumption. But it is proved by the clerk, if he be a competent witness to prove such a fact, that he did not then and there, nor in fact at any time, explain to her the contents of the instrument. Appellants insist that it is equally as essential to the validity of a conveyance executed by a married woman that the clerk shall explain its contents, and its effect to her, separately and apart from her husband, as that her acknowledgment and consent shall be so given. The acknowledgment and the consent that the conveyance may be recorded, must be the free and unconstrained act of the wife. Unless the one is made and the other given separately and apart from the husband, the presumption that she did not act freely and without constraint, arises as matter of law, and is conclusive of the question. While the law presumes, for the protection of the wife, that the presence of the husband puts her in moral duress, at least as to her actions, there is no such presumption as to the acquisition of information by her, touching the contents and legal effect of a written instrument by which her rights are to be affected. The information may be imparted in the presence of the husband. The wife may, in point of fact, draft the instrument herself, and may comprehend it more fully than the husband. To insure her an opportunity for free inquiry, the law directs the clerk to explain the deed to her separate and apart from her husband; but, as it is the information as to the contents and legal effect of the instrument, and not the time, place, and mode in which it is imparted, nor the person who

§ 561 a. **Explanation of title.**—The officer is not compelled to explain immaterial matters, nor is he compelled to explain to a married woman, acknowledging her deed before him the condition of her title, unless by a special covenant inserted in the deed her title is a part of it. The officer is not compelled to inform her whether her title rests in her or in her children, or to give her any advice or information whatever concerning her title. If he were compelled to do this it would be necessary for him to examine the records, and, possibly, to secure a legal opinion, before he could take a valid acknowledgment. It may be presumed that the holder of a title knows the character and extent of it, but if not, and no

imparts it, that constitutes the essence of the legal requisition, it cannot be regarded as indispensably necessary that the deed shall have been explained by the clerk in the absence of the husband in order to make it valid. That it was so explained, and, therefore, that Mrs. Board did understand its contents and legal effect, is to be presumed from the certificate of the clerk. Appellants seek to overcome this last and essential presumption by showing, not that she did not understand the deed, but that the clerk did not explain it to her. We need not intimate what our decision would be if the proof left the case in this attitude. But it is proved beyond question that the attorney who prepared the conveyance, and who, in the matter, may be said to have represented as well Mrs. Board as her husband, did read the deed to her, and did explain to her its contents and legal effect. It is objected, however, that when this explanation was made the husband was present, and, therefore, Mrs. Board did not have an opportunity to make full and free inquiry. The evidence does not very clearly show that the husband was present at the time of the explanation; but, if it be true that he was, it is still manifest that Mrs. Board made all the inquiries that she desired to make. When the clerk in the absence of her husband offered to make the necessary explanation, she failed to avail herself of the opportunity to make further inquiry, and declined to listen to the tendered explanation, upon the ground that she had heard the deed read and understood it. Another circumstance worthy of note is that the conveyance accords exactly with the desire and intention of Mrs. Board as expressed to Heston, when, in the absence of her husband, she requested him to accept the conveyance, in order that she might reconvey to the appellee. We are asked in this case, upon oral testimony, to disregard the presumption of law arising from the certificate of the clerk that Mrs. Board understood the contents and effect of the deed when she acknowledged it, and consented that it should be recorded. This oral testimony not only fails to contradict this presumption, but, in fact, shows that it is true. Such being the case, the presumption must control."

fraud or imposition is practiced in obtaining the conveyance, his or her ignorance of the title will supply no reason for the invalidation of the deed.<sup>1</sup>

§ 562. Where officer himself not required to explain. If the statute does not require that the officer shall himself explain the contents of the deed to the wife, it is sufficient if she is made acquainted with the contents by any person, that the officer is cognizant of this fact and duly certifies to it in his certificate.<sup>2</sup> A certificate of acknowledgment stated that a married woman "acknowledged and declared that she was well acquainted with the contents of the deed." Although the certificate did not state that the contents of the conveyance were made known to her by the officer, it was considered sufficient.<sup>3</sup>

§ 563. Omission of explanation.—A statute in Missouri, authorizing the acknowledgments of a married woman to be taken before certain courts, required that the certificate should set forth that the contents were "made known and explained to her." In a case before the court the certificate stated that the married woman was made acquainted with the contents of the deed, but did not state that they were *explained* to her. The court held that this omission did not vitiate the certificate of acknowledgment.<sup>4</sup> "The duty enjoined upon the officer," said the court, "is to see that the woman understands the

<sup>1</sup> Ray v. Crouch, 10 Mo. App. 321; Morrison v. McKee, 11 Mo. App. 594.

<sup>2</sup> Jansen v. McCahill, 22 Cal. 563, 565; 83 Am. Dec. 84; French Bank v. Beard, 54 Cal. 480.

<sup>3</sup> Thomas v. Meir, 18 Mo. 573. Concerning the objection that it did not appear that the officer acquainted the wife with the contents of the deed, Gamble, J., in delivering the opinion of the court, said: "The first objection will not be considered in this case, but will be dismissed with the remark that when a married woman, on examination apart from her husband, declares that she is well acquainted with the contents of the deed, the case ought to be considered as entirely unlike one in which the certificate is silent about her acquaintance with the contents of the deed. The certificate should receive the most liberal construction in favor of supporting the conveyance."

<sup>4</sup> Chauvin v. Wagner, 18 Mo. 541.

nature and effect of the instrument she has executed. It would clearly be superfluous for the court to attempt an explanation of the contents of a deed, if the woman should so state her own understanding of its effect as to show that she already understood it perfectly, and the certificate would be false, if it said that the contents of the deed were made known and explained to her, when the court took the acknowledgment upon ascertaining that she already knew and understood the contents.<sup>1</sup> Suppose a certificate should state that the woman appeared before the court and presented the deed for acknowledgment, stating that it was a deed for her own property, conveying it to the grantee for a consideration, which she named, and which was the consideration in the deed, and that the grantee was to receive the absolute estate in fee simple, and that she described the property just as it was described in the deed. If her statement, thus made to the court, corresponded with the language and legal effect of the deed, it is not doubted that she had already such acquaintance with the contents of the instrument as would dispense with any attempt on the part of the court to explain the contents to her. The design of the law would be accomplished, although the officer imparted no information to her. It would be a question of casuistry, whether the officer could certify that he made her acquainted with the contents of the deed, or explained the contents to her, when she knew them perfectly before she came before him. The courts and officers intrusted with the duty must be supposed to understand the object of the statute in requiring them to see that the woman knows the effect of her act, and the certificate is only required to show that the duty enjoined upon the officer has been performed. In some cases, as where the instrument is in a language with which the woman is not acquainted, it would be necessary to explain the meaning of the words employed in the instrument. In some cases where there are complicated limitations,

<sup>1</sup> Citing *McIntyre v. Ward*, 5 Binn. 301; *Talbot v. Simpson*, 1 Peters C. C. 190.

there may be a necessity for an explanation of the effect of such parts of the instrument. In such cases, the officer or court would explain the instrument, and the law requires the explanation to be made, unless the woman had the requisite knowledge without the explanation. The certificate in the present case states that the woman was made acquainted with the contents of the deed, and this may be regarded as a statement that she understood the nature and effect of the instrument. There are many cases in different courts in which such strictness is required as would render this acknowledgment ineffectual, because the fact is not stated that the contents of the deed were explained to Mrs. Chauvin; but we are not disposed to require any such literal compliance with the statute. It is said in the certificate that the contents were familiarly known to her, because that is the meaning of the words that she was made 'acquainted with the contents,' and we will intend that there was a case before the court taking the acknowledgment, which did not require any explanation to be made to the woman."<sup>1</sup>

§ 563 a. **Presumption of knowledge.**—In certain cases the fact of knowledge of the contents of the deed may be

<sup>1</sup> *Chauvin v. Wagner, supra.* See, also, *Ray v. Crouch*, 10 App. Mo. 321; *Talbot v. Simpson*, 1 Peters C. C. 138; *Martin v. Davidson*, 3 Bush, 572; *Nantz v. Bailey*, 3 Dana, 111; *Gregory v. Ford*, 5 Mon. B. 471; *Kavanaugh v. Day*, 10 R. L. 393, 397; 14 Am. Rep. 691; *Hughes v. Lane*, 11 Ill. 123; 50 Am. Dec. 436; *Nippel v. Hammond*, 4 Col. 211. In *Talbot v. Simpson, supra*, Washington, J., said: "As to her knowledge of the contents of the deed, it is manifest, that unless the magistrate made them known to her, or she to him, he has certified a falsehood, for he states it as a fact, that she knew the contents, which he could not truly certify unless he had in some way satisfied himself that she did know them. And of what importance would it be whether she obtained this knowledge from the magistrate, from her own examination of the deed, or even from the information of her husband, if the fact certified be true that she knew the contents." Whether the certificate must state that the deed was explained to the wife is for the most part matter of special statutory regulation. In some instances it has been held unnecessary: *Stevens v. Doe*, 6 Blackf. 475; *Gregory v. Ford*, 5 Mon. B. 471; *Chesnut v. Shane*, 16 Ohio, 599; 47 Am. Dec. 387; *Card v. Patterson*, 5 Ohio St. 319. But see *Good v. Zercher*, 12 Ohio, 364; *Connell v. Connell*, 6 Ohio, 358; *Silliman v. Cummins*, 13 Ohio, 116; *Meddock v. Williams*, 12 Ohio, 377.



presumed. Thus, instruments providing for the transfer of property to a trustee in trust for the grantor and his wife, during their lives, and disposing of the residue after their death, had been prepared after consultation and deliberation, and the officer who took the acknowledgment of the grantors testified that the deeds had been signed before he came to take the acknowledgment, and that the grantors acknowledged their execution. It would be presumed, the court held, that the grantors had read the deeds, and that the wife freely and voluntarily executed them with a full knowledge of their contents and of the effect which they had upon her rights.<sup>1</sup>

§ 564. **Acknowledgment by deaf mutes.**—The information required to be given to a married woman concerning the contents and purport of a deed, may be done by signs, if she is a deaf mute. And she may also signify her willingness to execute the deed, and the fact that she fully understands it, in the same mode.<sup>2</sup>

§ 565. **Execution of deed must be voluntary and free from compulsion.**—The very essence of the acknowledgment of a married woman is that the execution of the deed is her voluntary act, performed understandingly and without coercion. Hence, to render the certificate valid, this fact must appear either by using the words of the statute or words of equivalent signification.<sup>3</sup> “The essential thing to be accomplished in effecting a conveyance by *femes covert* is the privy examination, whereby it is ascertained that her execution of the instrument was voluntary, free, and without fear, compulsion, or undue in-

<sup>1</sup> Massey v. Huntington, 118 Ill. 80.

<sup>2</sup> In the Matter of Harper, 6 Man. & G. 732.

<sup>3</sup> Garrett v. Moss, 22 Ill. 363; Bartlett v. Fleming, 3 W. Va. 163; Stillwell v. Adams, 29 Ark. 346; Loudon v. Blythe, 27 Pa. St. 22; 67 Am. Dec. 442; Tubbs v. Gatewood, 26 Ark. 128; Chaffe v. Oliver, 39 Ark. 531; Bagby v. Emberson, 79 Mo. 139; Little v. Dodge, 32 Ark. 453; Hayden v. Moffatt, 74 Tex. 647; 15 Am. St. Rep. 866; Belcher v. Weaver, 46 Tex. 293; 26 Am. Rep. 267; Smith v. Elliott, 39 Tex. 201; Pickens v. Knisely, 29 W. Va. 1; 6 Am. St. Rep. 322; Laughlin v. Fream, 14 W. Va. 322; Stillwell v. Adams, 29 Ark. 346; Bollen v. Teel, 76 Va. 487.



fluence. This was the essential thing in a conveyance by fine in England; and in all the varying legislation upon this subject in this State, and in all the States of the Union, this has been the one primary object in view. Whatever statutory provisions have reference to the complete accomplishment of that object, and the protection of the *feme covert*, must be regarded as mandatory. But general provisions of the statute in regard to the mode of executing or authenticating such deeds, not having reference to this essential condition, need not be considered as mandatory, unless circumstances or the obvious intent of the legislature so indicate." Where a certificate of acknowledgment stated that the married woman "acknowledged to me that she executed the same freely and voluntarily, and for the uses and purposes therein mentioned, without fear or compulsion, and that she did not wish to retract the same, well knowing the contents thereof, after due explanation by me made," it was held sufficient, although it omitted the words "undue influence" contained in the statute.<sup>2</sup>

**§ 566. Comments — Equivalent words for voluntary act.** — It is manifestly impossible to lay down any universal rule by which it can be said that any particular word or phrase is the equivalent of the words used in the statute, requiring that the act of the *feme covert* shall be voluntary and without compulsion. All that we can do

<sup>1</sup> Mount v. Kesterson, 6 Cold. 452, 459, per Andrews, J. See, also, Gill v. Fauntleroy, 8 Mon. B. 177; Blackburn v. Pennington, 8 Mon. B. 217; Jones v. Lewis, 8 Ired. 70; 47 Am. Dec. 338; Lucas v. Cobbs, 1 Dev. & B. 228; Pratt v. Battels, 28 Vt. 685.

<sup>2</sup> Goode v. Smith, 13 Cal. 81. Baldwin, J., in delivering the opinion of the court, said: "We think that the acknowledgment was sufficient as to the husband and wife. It is true that it does not follow the word of the statute, but this is not necessary. The certificate shows a privy examination of the wife—that the deed was freely and voluntarily executed without threats, fear, or compulsion. It is true that it does not state that it was executed without undue influence; but it is difficult to see how a deed, freely and voluntarily executed, without fear, threats, or compulsion, could be executed under undue influence, or indeed any extraneous influence at all."

is to bring to the attention of the reader some of the cases in which the question has been decided, whether particular words are or are not of equivalent import with other words, and leave him to make the application to any particular case he may have under investigation. In some courts the rule that prevails is to uphold the certificate by all possible rules of construction. In others, a disposition is evinced to view the certificate with strictness, and to require a literal compliance with every requirement of the statute. This fact may account in some measure for the conflicting decisions that are found upon the various topics relating to acknowledgments, while at the same time it shows the difficulty of formulating general rules.

§ 567. **Instances.**— In an early case in Maryland, a certificate of acknowledgment stated that the wife being examined privately and out of the hearing of her husband, acknowledged that she executed the same “of her own free will, and not through any threats of her said husband, or fear of his displeasure,” but omitted the words “ill-usage.” It was held that this omission invalidated the deed.<sup>1</sup> But it was held, where the certificate stated that a married woman acknowledged the deed “freely, without any fear, threats, or compulsion of her husband,” that the omission of the word “voluntarily” was immaterial, as its place was substantially supplied by the other expression.<sup>2</sup> It has been held that the

<sup>1</sup> *Hawkins v. Burress*, 1 Har. & J. 513. Said Chase, C. J: “It is not for the court to say what the words of the law ought to be, they must take them as they are. The court think the acknowledgment certified is defective, and does not divest the estate of the *feme covert*, who was in this case grantor. They think the words ‘ill-usage by’ are material; therefore, the court are of opinion, and so direct the jury, that the acknowledgment of the *feme covert* is defective, the words ‘ill-usage’ not being inserted in the certificate of the justices who took the said acknowledgment; and that the said deed is inoperative to pass and transfer her interest in the said land.”

<sup>2</sup> *Lessee of Battin v. Bigelow*, 1 Peters C. C. 452. Where the statute requires that the certificate of acknowledgment of a deed of a married woman should state that she “acknowledged such instrument to be her

words "without undue influence or compulsion of her husband," are equivalent in signification to the clause, "of her own free will, without undue influence or compulsion of her husband." Said Harrison, J: "The wife is under subjection to no one except her husband, and her freedom from the constraint and control of all other persons is presumed and need not be shown, and the free will with which she is required to act in the disposal of her real estate is freedom from the constraint and undue influence of her husband."<sup>1</sup>

§ 568. Omission of the word "fear"—Conflicting decisions.—It was held in Alabama, that a certificate of acknowledgment stating that a married woman "signed, sealed, and delivered the above instrument, of her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the express purposes therein stated," did not substantially comply with the statute requiring an acknowledgment that she signed, sealed, and delivered the deed "as her voluntary act and deed, freely, without any *fear*, threats, or compulsion of her said husband," for the reason that it omitted to state that she acknowledged the deed without any *fear*.<sup>2</sup> In a later case in

act and deed, and declared that she had willingly signed the same," a certificate stating that "she acknowledged the same freely and willingly," does not comply with the statute: *Hayden v. Moffatt*, 74 Tex. 647; 15 Am. St. Rep. 886.

<sup>1</sup> *Tubbs v. Gatewood*, 26 Ark. 128. The statute then in force providing for the authentication of the certificates of married women was as follows: "The conveyance of any real estate by any married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated, and the title passed by such married woman voluntarily appearing before the proper court or officer, and in the absence of her husband, declaring that she had, of her own free will, executed the deed or instrument in question, or that she had signed and sealed the relinquishment of dower for the purposes therein contained and set forth, without compulsion or undue influence of her husband."

<sup>2</sup> *Boykin v. Rain*, 28 Ala. 332; 65 Am. Dec. 349. Mr. Justice Rice said: "It was essential that she should acknowledge, amongst other things, that she executed the mortgage 'without any fear.' She has not acknowledged this, nor anything *in substance the same*. It will not do to say she has acknowledged something *like* it. Resemblance is not identity. Fear may exist on the part of the wife, 'without any force, per-

the same State, this certificate of acknowledgment again came before the same tribunal. There was at this time a change in the members of the court, and a majority of the court said they were not satisfied with the former decision, but would adhere to it, to avoid the injury that would ensue from overruling it.<sup>1</sup> Mr. Justice Stone, with whom concurred Mr. Justice R. W. Walker, said, speaking of the former case of *Boykin v. Rain*: "In that case the court held that the certificate was not a substantial compliance with the requirements of the statute, and that consequently the title did not pass. The case was decided before I became a member of the court; but an application for a rehearing was submitted to the court after my election. The majority overruled the application, but I

suasion, or threats' from the husband. Her acknowledgment, that she executed the deed of her own free will and accord, is not identical in substance with an acknowledgment that she executed it freely, without any fear of her husband. Fear may exist, and often does exist, in a degree so moderate as not to destroy the freedom of the will. Thus, 'by faith, Noah, being warned of God of things not seen as yet, moved with fear, prepared an ark to the saving of his house': Hebrews xi. 7. A deed, executed with very slight fear, by a person *sui juris*, could not for that cause only be set aside. Fear may exist to a degree which amounts to undue influence, or moral coercion. But it may exist in a much more moderate degree, and fall far short of undue influence or moral coercion. It need not and may not be the predominant motive. If the words contained in the acknowledgment by a married woman of the execution of a deed purporting to convey her land, do not exclude or negative the idea, that at the time she executed the deed any fear of her husband existed, the acknowledgment is insufficient, without regard to the degree of that fear. Her acknowledgment that she executed it of her own free will and accord, does not negative the existence of fear in its mildest and most moderate degree. We cannot dispense with any requirement of the law (*Bright v. Boyd*, 1 Story, 486; 1 Story's Eq., §§ 97, 117); and as the acknowledgment under consideration is not such as was prescribed, the mortgage did not pass the estate of Mrs. Hazard in the land: *Hollingsworth v. McDonald*, 2 Har. & J. 230; 3 Am. Dec. 545; *Chauvin v. Wagner*, 18 Mo. 531; *Elliot v. Piersol*, 1 Peters, 338; *Gill v. Fauntleroy*, 8 Mon. B. 178; *Jourdan v. Jourdan*, 9 Serg. & R. 274; 11 Am. Dec. 724; *Flanagan v. Young*, 2 Har. & McH. 38; *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245; *Green v. Branton*, 1 Dev. Eq. 500; *Bright v. Boyd*, 1 Story, 487; 1 Story's Eq. Juris. §§ 96, 177; *Morceau v. Detchemendy*, 18 Mo. 522; *Warren v. Brown*, 25 Miss. 66; 57 Am. Dec. 191."

<sup>1</sup> *Alabama Life Ins. & Trust Co. v. Boykin*, 38 Ala. 510.

did not concur in their conclusion. That decision has stood for several years; and although I am not convinced of its correctness, I think more evil would result from overturning it now than from adhering to it. Few deeds, if any, will be found so entirely like the one there construed as to constitute that case a dangerous precedent; and uniformity of decision in cases affecting rights of property is one of the benefits that result from a well regulated judicial system. I adhere to that decision." But A. J. Walker, C. J., said: "I was on the bench when the opinion in *Boykin v. Rain*<sup>1</sup> was delivered. That opinion has the full sanction of my judgment. The argument and investigation on this appeal has not shaken, but has served to confirm, the conviction previously entertained. I hold that the opinion in *Boykin v. Rain* was right; and I base my assent to an affirmance upon the intrinsic merits of the questions involved, and not upon the doctrine of *stare decisis*."<sup>2</sup> These decisions, however, are in direct conflict with those on similar certificates of acknowledgment in other States. In Ohio, the statute required that if the married woman, upon an examination separate and apart from her husband, shall declare "that she doth voluntarily, and of her own free will and accord, without any fear or coercion of her husband, did and doth now acknowledge the signing and sealing thereof," the officer shall certify the facts. The certificate of acknowledgment stated that the husband and wife appeared before the officer, and "having been made acquainted with the contents, and being examined separate and apart, the wife from the husband, acknowledged the above indenture to be their voluntary act and deed, for the uses and purposes therein mentioned," omitting the word "fear." The court held that this certificate substantially complied with the statute, and was sufficient.<sup>3</sup> Speaking of the objection that it did not appear from the certificate that the wife acted without *fear* and coercion

<sup>1</sup> 28 Ala. 332; 65 Am. Dec. 349.      <sup>2</sup> See *Motes v. Carter*, 73 Ala. 553.

<sup>3</sup> *Brown v. Farran*, 3 Ohio, 140, 153.

of the husband, Mr. Justice Burnet, delivering the opinion of the court, said: "It is true that it does not appear from the certificate that the wife acted without any fear or coercion of her husband. It is true that those words are not contained in the certificate, but the justice certifies that she acknowledged the deed to be her voluntary act, and, if voluntary, it could not have been done under the influence of fear or coercion. The term 'voluntary' is defined to be, acting without compulsion, acting by choice, willing, of one's own accord. The declaration of the wife, then, on her separate examination, excludes the idea of fear or force. If she executed the instrument willingly, of choice, and of her own accord, as her admission before the justice imports, she could not have been under the influence of fear, much less of coercion. An act done in consequence of fear cannot be done willingly and of choice. The one unavoidably excludes the other, so that the magistrate, although he has not used all the words given in the statute, has taken one which includes the substance of all the others." This decision has been affirmed in later cases.<sup>1</sup> In New Jersey the statute provided that the estate of a married woman should not pass

<sup>1</sup> *Ruffner v. McLenan*, 16 Ohio, 639; *Dengenhart v. Cracraft*, 36 Ohio St. 549, 573. In the former case Hitchcock, J., referring to *Brown v. Farran*, said (p. 652): "I assented to the principles settled in this case, and think they should have never been departed from. Any other decision would have shaken the titles to many millions of property, which had been acquired by the then present holders, by fair and *bona fide* purchase. A contrary decision, it is true, might have enabled many widows to reclaim property, which had been by their consent sold and conveyed, for an ample consideration, or it might have enabled them to enforce claims for dower in premises, for the conveyance of which they had joined with their husband, and done all on their part that could be done to make such conveyance effective. And if such conveyances are not to be held effective, it is for the sole reason that an officer whose duty it was to take an acknowledgment of the conveyance has omitted some technical formality in reducing the certificate of acknowledgment to writing. Another reason why I assented to the principle of this decision, and why I am still willing to adhere to those principles, is that I am unwilling to adopt any rule of construction to a statute, or to recognize as principle a law, which will encourage any portion of the community, whether male or female, in fraud or dishonesty."

by her deed, unless on a private examination she acknowledged that she "signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband, and a certificate thereof written on or under the said deed or conveyance, and signed by the officer before whom it was made." A certificate of acknowledgment stated that the wife being "examined, separate and apart from her husband did acknowledge that she signed, sealed, and delivered the same, freely and voluntarily, and without any threats or compulsion from her said husband." The court held that the certificate was not vitiated by the omission of the word "fear." "The censure cast on this acknowledgment," said the court, "for the want of the word 'fear,' is entirely too severe a criticism, if a substantial compliance satisfies the act. It is very possible, as remarked by counsel on the argument, that fear may exist without threats, but it is not very easy to suppose there can be fear if there be no compulsion; and if the wife executed the deed 'freely and voluntarily,' she must necessarily have been without fear. These expressions negative, in the most unequivocal and exclusive manner, the presence of fear."<sup>1</sup>

<sup>1</sup> Den v. Geiger, 4 Halst. (9 N. J. L.) 225, 233. In Dundas v. Hitchcock, 12 How. 256, 269, Mr. Justice Grier said: "It is objected also that this acknowledgment is not in the very words of the statute. In the place of the words, 'as her voluntary act and deed,' it substitutes the words, 'freely and of her own accord.' That the words of the acknowledgment have the same meaning, and are in substance the same with those used in the statute, it needs no argument to demonstrate; and that such an acknowledgment is a sufficient compliance with the statute to give validity to the deed of the wife, is not only consonant with reason, but as the cases cited by counsel show, supported by very numerous authorities. The act requires a private examination of the wife to ascertain that she acts freely and not by compulsion of her husband, but, it prescribes no precise form of words to be used in the certificate, nor requires that it should contain all the synonyms used in the statute to express the meaning of the legislature. In other acts of the same legislature, where a precise form of acknowledgment of certain deeds is prescribed, it is provided that 'any certificate of probate or acknowledgment of any such deed shall be good and effectual if it contain the substance, whether it be in the form or not, of that set forth in the first



§ 569. **Comments.** — There can be little doubt but that the decisions made in Alabama, in the cases cited, where the word “fear” was omitted, would not be accepted as authority elsewhere. Indeed, the very court that rendered the decision was convinced of its incorrectness, and only adhered to it on the doctrine of *stare decisis*, and because its overthrow would be followed by disastrous results. While a compliance with the requirements of the statute should always be insisted upon, it should be a substantial, and not a strictly literal compliance. Regard should be had to the intention of the legislature, and if it is manifest that the conveyance of the married woman has been executed conformably to the provisions of the statute, and this fact is made reasonably to appear, the certificate should not be set aside, merely because there is a possibility that a state of fear might have existed on her part, which, though not entirely excluded by the words employed, yet from them cannot be fairly implied.<sup>1</sup>

§ 569 a. **Unacknowledged contract to convey land.** Where it is essential to a conveyance by a married woman that it should be acknowledged, a contract to convey her separate estate is, if unacknowledged, void.<sup>2</sup> Though the vendee may enter into possession under the agreement and pay the purchase money, she may recover the land

section of the act: Clay's Dig. 153. The legislature have thus shown a laudable anxiety to hinder a construction of their statutes, which would require a stringent adherence to a mere form of words without regard to their meaning or substance, and make the validity of titles to depend on the verbal accuracy of careless scriveners.”

<sup>1</sup> But if the statute requires the word “fear” to be inserted in the certificate, that word or one of similar import must be used, or the certificate will be held defective: *Hollingsworth v. McDonald*, 2 Har. & J. 230; 3 Am. Dec. 545.

<sup>2</sup> *Kirk v. Clark*, 59 Pa. St. 479; *Stivers v. Tucker*, 126 Pa. St. 74; *Rumfelt v. Clemens*, 46 Pa. St. 455; *Colburn v. Kelly*, 61 Pa. St. 314; *Glidden v. Strupler*, 52 Pa. St. 400; *Knowles v. McCamly*, 10 Paige, 342; *Innis v. Templeton*, 95 Pa. St. 262; 40 Am. Rep. 643; *Kirkland v. Hepselgefer*, 2 Grant's Cas. 84; *Miltenberger v. Croyle*, 27 Pa. St. 170; *Roseburgh v. Sterling*, 27 Pa. St. 292; *Jackson v. Torrence*, 83 Cal. 521.



in ejectment. The vendee cannot hold possession in equity until the purchase money is repaid.<sup>1</sup> After her death her heirs can likewise maintain ejectment for the land.<sup>2</sup> She is not estopped by acts and declarations that would bind her as an estoppel if she were a *feme sole*.<sup>3</sup> As her contract to convey is void, she cannot ratify it by acts, but only by a deed executed in the manner prescribed by statute.<sup>4</sup> Even though a contract to convey may not be

<sup>1</sup> *Rumfelt v. Clemens*, 46 Pa. St. 455. Said Mr. Justice Agnew in delivering the opinion of the court: "To say that her contract of sale of her interest in lands made, as the law presumes in every case, under the influence of her husband, unless separately examined, and giving her free consent to it, is good in equity, unless she refunds the price, is to take away the very protection the acts of assembly intended to provide. What assurance have we in this, or in any, case that the agreement was not procured from her by threats, cruel treatment, or a course of petty annoyances, amounting to an absolute constraint? The policy of the law, in this respect, is founded in a deep insight of the marriage relation, exposing the timid, shrinking wife to the storm of passion, the torturing reproach, or the heart-breaking unkindness of her husband. If we hold that a defense in equity, founded on possession and payment of purchase money, may be set up, we shall clearly be bound to permit the wife to reply to it, by showing conjugal restraints, her own unwillingness, the efforts of the husband to compel, and the unpleasant tales of family jars! Equity, clearly, would not execute an involuntary contract, while it would never do to open the door to the revelations of domestic discord. Beyond this, how shall we protect the wife against those private acts of compulsion unseen by the public eye, when no proof can be brought to expose the unfeeling conduct of the husband to the light of truth? Again, if we hold that without repayment she can recover her property, sold probably under the pressure of importunity or coercion, with an intention to possess himself of her estate, how will she ever recover after a dissolute husband has squandered the proceeds, or when he is unable or refuses to refund it? She cannot repay nor contract a loan to repay it. Of what use to her would be a verdict for possession, subject to the condition of repayment? Thus, she is left exposed to all the danger and hardship of her situation when united to a husband whose unkindness, rapacity, misfortune, or vice has robbed her of her estate. There is no safety but to hold, as this court has heretofore held, that the agreement of the wife is void in equity as well as law, unless she has been afforded an opportunity, at least, to unburthen her griefs in the ear of the officer of the law, in the privacy of a separate examination."

<sup>2</sup> *Kirk v. Clark*, 59 Pa. St. 479.

<sup>3</sup> *Stivers v. Tucker*, 126 Pa. St. 74.

<sup>4</sup> *Glidden v. Strupler*, 52 Pa. St. 400.

within the letter of the statute relating to conveyances by married women, it is within its meaning and within the policy of the law requiring acknowledgments by married women.<sup>1</sup> So where the husband and wife are jointly interested in the title, and a contract to convey is signed, by herself and husband, which she fails to acknowledge, she is not estopped from claiming her separate interest in the property because she fails to give express notice to the purchaser that she claims a definite interest, or to inform him of the nature and extent of her title. Nor can she be conclusively presumed to know the law that such unacknowledged contract was her husband's sole contract. No estoppel can be raised against her founded on such a presumption, because the question of her knowledge as to whether her husband claimed by the contract the right to convey the whole property without her consent is not one of legal fiction, but depending on actual knowledge, motives, and intention.<sup>2</sup> As an unacknowledged executory contract to convey her separate estate cannot be enforced against her, neither can it be specifically enforced against the vendee. The contract is not voidable at her option, but is absolutely void and is to be treated as a *nudum pactum* for all purposes.<sup>3</sup>

§ 570. Other cases in which certificates have been construed.—Where the statute required the certificate to state that she executed the deed “freely, voluntarily, without compulsion, constraint, or coercion by her husband,” a certificate omitting these words and simply declaring that she had acknowledged the deed, and “had willingly signed, sealed, and delivered the same, and that she wished not to retract it,” is a nullity.<sup>4</sup> In West Virginia, the statute requires that the wife shall in acknowledging her deed declare that “she had willingly executed the same, and does not wish to retract it.” A certificate omitted the words that “she had willingly executed the same,” although it contained the phrase, “and does not

<sup>1</sup> Jackson v. Torrence, 83 Cal. 521.

<sup>2</sup> Banbury v. Arnold, 91 Cal. 606.

<sup>3</sup> Jackson v. Torrence, 83 Cal. 521.

<sup>4</sup> Henderson v. Rice, 1 Cold. 223.

wish to retract it." The certificate, on account of this omission, was held fatally defective.<sup>1</sup> But a certificate of acknowledgment which shows that the wife acknowledged the execution of the deed "without any fear, threats, or

<sup>1</sup> *Leftwich v. Neal*, 7 W. Va. 569. Paull, J., said: "In the certificate now under consideration, the declaration of the wife that she had willingly executed the deed is entirely omitted, but it does contain the words, 'that she does not wish to retract it.' The certificate recites that she declared the same to be her act, and this is required by the statute; but this by no means implies a compliance with the additional requirement of the statute immediately following, to wit: 'And declared that she had willingly executed the same, and does not wish to retract it.' If authority is needed on this proposition, it is found in *Blackburn's Heirs v. Pennington*, 8 Mon. B. 217. There the certificate showed that the grantors, including the wife, acknowledged the deed to be their act, and that she was privily examined. But the court held that this certificate must show that her acknowledgment was voluntary, and that it could not be inferred from the fact of her privy examination; in other words, a certificate merely that a deed was acknowledged to be her act did not prove or show that it was a voluntary acknowledgment. And if, under our statute, the fact that a certificate showing that a *feme* acknowledged a deed to be her act does not imply a compliance with the further requirement of the statute that she willingly executed the same; that these are in fact equivalent expressions, no more, we think, does the fact that the words, 'that she did not wish to retract it,' found in the certificate, prove or show that she willingly executed the deed. We do not think that it can be necessarily inferred, because a *feme* acknowledged that she doth wish to retract what she has done, that, therefore, she willingly executed the deed. The execution might have been at one period, and under duress or coercion, while the acknowledgment that she did not wish to retract it is made at a subsequent time and under different influences. It cannot be said, at least, that this is impossible. But here is the express provision of the statute requiring her declaration that she willingly executed the deed, and does not wish to retract it, to be certified and recorded. The two phrases are connected by the copulative conjunction *and*, not by the disjunctive conjunction *or*; in the latter case they might have been construed as equivalent expressions, and the presence of the last might be construed as dispensing with that of the former. But the legislature has expressly inserted them both, and both, or an equivalent for both, must be embraced in a certificate to make the deed operative. This, we think, is essential, in order that we may not, in the language of Judge Tucker, 'dispense with any part of the law,' and, in the language of Judge Allen, 'there is good reason for requiring a substantial compliance with all the requisites of the statute.' The legislature does not seem to have regarded these phrases as being of the same import, and the rules of interpretation require that the courts shall give effect to every part of the act. It has been contended that the case

compulsion" on the part of the husband, upon an examination separate and apart from him, is not rendered defective by the omission of the words, "freely and voluntarily."<sup>1</sup> Where a statute required that the certificate should show that she had, "of her own free will, executed the deed, without compulsion or undue influence of her husband," it is a substantial compliance to state in the certificate that she acknowledged that she "signed said deed freely, and of her own consent, but not by the persuasion or compulsion of her said husband," which latter expression is equivalent to the former.<sup>2</sup> Where the statute requires that a deed shall be fully explained to the wife by the officer taking her acknowledgment, a certificate of acknowledgment reciting that the wife, "being examined by me privily and apart from her husband, declared that she fully understood the contents of said deed, and that she signed it freely and without fear of her

of *Gill and Simpson v. Fauntleroy's Heirs*, 8 Mon. B. 177, authorizes a different effect or construction to the language used in this certificate, and decides that the phrase, 'and does not wish to retract it,' is equivalent to the language 'that she willingly executed the same.' We observe that we have not seen the Kentucky statute, but we infer from the language of the courts, in the cases we have examined, that their statute does not contain the provision in the same form as ours, requiring the certificate of two independent facts connected together. Moreover, the certificate in this case of *Gill and Simpson v. Fauntleroy's Heirs*, states other matters not embraced in ours, and the judgment of the court is founded, seemingly, upon them all. The court say: 'The declaration that she did not wish to retract is equivalent to a declaration that she wished the deed to stand as her deed; and she further evinces this desire by again acknowledging it, and consenting that it might be recorded. It seems to us that this should be regarded as tantamount to a declaration that she fully acknowledged the deed.' We do not think this case, upon a careful examination, justifies the full effect which has been claimed for it, and cannot, we think, be allowed to override an express requirement of our statute. Upon the whole, we think the certificate is fatally defective in the particular to which reference has been made."

<sup>1</sup> *Allen v. Denoir*, 53 Miss. 321.

<sup>2</sup> *Little v. Dodge*, 32 Ark. 453. See, also, for further cases, *Belcher v. Weaver*, 46 Tex. 293; 26 Am. Rep. 267; *Dennis v. Tarpenny*, 20 Barb. 371; *Bernard v. Elder*, 50 Miss. 336; *Stuart v. Dutton*, 39 Ill. 91; *Gorman v. Stanton*, 5 Mo. App. 585; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Bartlett v. Fleming*, 3 W. Va. 163; *Solyer v. Romanet*, 52 Tex. 562; *Lucas v. Cobbs*, 1 Dev. & B. 228; *Laird v. Scott*, 5 Heisk. 314.

husband, and did not wish to retract it," is insufficient.<sup>1</sup> So, the omission of the words, "and for the purposes therein expressed," has been held to render the certificate defective.<sup>2</sup>

§ 571. **Substantial compliance with the statute sufficient.**—As the certificate of acknowledgment of a married woman is generally considered an essential part of her deed, it is evident that there must be a compliance with all the statutory provisions on the subject. But, as is apparent from what has been said in previous sections, it is not necessary that there should be a literal compliance with these provisions. The cases that have already been cited are authority for the statement that slight deviations from the language of the statute will not vitiate an acknowledgment. It is sufficient if the requirements of the statute have been substantially observed. Without entering into details, we may quote as a correct exposition of the law upon this subject the remarks of Mr. Justice Breese: "It has been often held by this court that in the acknowledgment of a deed by a married woman, it is sufficient if it appears the statute has been substantially observed and followed. A mere literal compliance is not demanded nor expected. The great object which the legislature seems to have had in view in prescribing the mode by which a married woman may be divested of her interest in land, seems to be that she should not be imposed upon or coerced by her husband, and to protect her from imposition or coercion, the officer shall examine her separate and apart from her husband, that he shall explain to her the nature of the act she is about to consummate, and this, by explaining to her the contents of the deed she has executed, and, if it is her own estate she is conveying, that she may retract if she desires to do so, for any cause then operating upon her. It is the design of the law she should be informed of her true position

<sup>1</sup> *Langton v. Marshall*, 59 Tex. 296.

<sup>2</sup> *Currie v. Kerr*, 11 Lea (Tenn.), 138.

and of the real nature of her interest in the land, and this is presumed to be done by the officer, by his certificate that he fully explained to her the contents of the deed. When all these appear from the certificate, slight departures from the words of the law will not prejudice; so long as the substance is preserved, mere technical objections will not be favored."<sup>1</sup> Where the certificate states that the wife acknowledged that she "signed" the deed, this is a substantial compliance with the statute using the additional words "sealed and delivered."<sup>2</sup> Where the statute requires that the acknowledgment shall be "on examination apart from and without the hearing of her husband," and provides that every certificate which substantially conforms to the requirements of the statute shall be valid, a certificate which states that the acknowledgment was made "on a private examination separate and apart from her husband," substantially complies with the statute.<sup>3</sup>

§ 572. **Surplusage.**—A certificate of acknowledgment that complies with all the requirements of the statute is not invalidated by the fact that it states more than is necessary. This principle is frequently illustrated in cases where a clause is added relinquishing the right of dower when no such statement is necessary. It may not be inappropriate to give as a pertinent illustration of this

<sup>1</sup> In *Stuart v. Dutton*, 39 Ill. 91, 93. See, also, *Muir v. Galloway*, 61 Cal. 498; *Kottman v. Ayer*, 1 Strob. 552; *Thayer v. Torrey*, 37 N. J. L. 339; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Merriam v. Harsen*, 2 Barb. Ch. 232; *Young v. State*, 7 Gill & J. 253; *Langhorne v. Hobson*, 4 Leigh, 224; *Owen v. Norris*, 5 Blackf. 479; *Allen v. Lenoir*, 53 Miss. 321; *Johns v. Reardon*, 11 Md. 465; *Hughes v. Lane*, 11 Ill. 123; 50 Am. Dec. 436; *Hollingsworth v. McDonald*, 2 Har. & J. 230; 3 Am. Dec. 545; *McIntire v. Ward*, 5 Binn. 296; 6 Am. Dec. 417; *Coombes v. Thomas*, 57 Tex. 321; *Gordon v. Leech*, 81 Ky. 229. Where the acknowledgment of husband and wife were certified in the same certificate, the certificate relating to the wife may be aided by language contained in the certificate relating to their joint acknowledgment: *Soyler v. Romanet*, 52 Tex. 562; *Donahue v. Mills*, 41 Ark. 421. But see, in Illinois, *Merritt v. Yates*, 71 Ill. 636; 22 Am. Rep. 128; *Hartshorn v. Dawson*, 79 Ill. 108.

<sup>2</sup> *Mullins v. Weaver*, 57 Tex. 5.

<sup>3</sup> *Muir v. Galloway*, 61 Cal. 498.

principle a case which occurred in Mississippi, where the certificate of acknowledgment after stating that the husband and wife acknowledged that they signed, sealed, and delivered the deed as their act and deed, proceeded to state that the wife "did, on a private examination made of her apart from her husband, acknowledge that she signed, sealed, and delivered the same as her voluntary act and deed, and without any fear, threats, or compulsion of her said husband, and in bar of her dower." The property conveyed was the separate property of the wife, and, therefore, it was unnecessary to say anything about dower. It was urged before the court that these last words, "and in bar of her dower," should be understood as qualifying all that preceded them in the certificate of acknowledgment, and that the effect of the whole acknowledgment was but a relinquishment of the wife's right of dower. But the court held that this clause was surplusage, and did not invalidate the certificate. In the words of the court: "The language of the latter clause must be taken with reference to the preceding clause, and also with reference to the interest intended to be conveyed, as shown by the deed itself; and, so considered, it is not justly susceptible of any other construction than that, on the private examination, she acknowledged that she executed the instrument as her act and deed, for the uses and purposes therein named, which appear by the deed to be a conveyance of the property as belonging to her. As the property was her separate estate, she, therefore, acknowledged that she conveyed it as such, according to the purport of the deed. This was manifestly the object which the parties intended to effect, and the words of the acknowledgment are sufficient for the purpose. The superadded words 'and in bar of her dower' do not restrict or impair the acknowledgment already made, but must be understood as intended to release her right of dower, *in addition to the estate already conveyed*. This is the fair construction of the language used, and these concluding words were, doubtless, used under the impression that her right of



dower had to be released in terms, in addition to her acknowledgment that she conveyed her separate estate. But being useless, under the circumstances in which the title to the property stood, and merely in addition to what was previously stated, they are mere surplusage, and cannot limit or affect her acknowledgment as to the conveyance of her sole and separate estate, which was complete without them."<sup>1</sup> Where the statute requires that an express relinquishment of dower shall be inserted in the certificate of acknowledgment of a married woman to bar her right of dower, to give the deed this effect the statute must be complied with. The statement that she acknowledged the execution of the deed is not sufficient.<sup>2</sup>

§ 573. **Community property.**—In California, all property of either husband or wife, owned before marriage or acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits, is the separate property of such husband or wife. All other property acquired after marriage by either husband or wife, or both, is community property, of which the husband has the management and control with the same absolute power of disposition that he possesses of his own separate estate.<sup>3</sup> The presumption is that all property acquired by either husband or wife after marriage is community property, and this presumption can only be overcome by evidence establishing its character as separate property.<sup>4</sup> Accordingly, though the property may stand in the name of the

<sup>1</sup> *Stone v. Montgomery*, 35 Miss. 83, 106. See, also, *Barker v. Circle*, 60 Mo. 258; *Chauvin v. Wagner*, 18 Mo. 531; *Perkins v. Carter*, 20 Mo. 465; *Chester v. Rumsey*, 26 Ill. 97; *Stuart v. Dutton*, 39 Ill. 91; *Moore v. Titman*, 33 Ill. 358; *Delassus v. Poston*, 19 Mo. 425; *Hartley v. Ferrel*, 9 Fla. 374. But see *Lane v. Dolick*, 6 McLean, 200; *McDaniel v. Priest*, 12 Mo. 544.

<sup>2</sup> *Thomas v. Meier*, 18 Mo. 573; *Lindley v. Smith*, 46 Ill. 524; *Becker v. Quigg*, 54 Ill. 390.

<sup>3</sup> See Cal. Civil Code, §§ 162, 163, 164, 172. See vol. 2, §§ 865–880.

<sup>4</sup> *Smith v. Smith*, 12 Cal. 216; 73 Am. Dec. 533; *Burton v. Lies*, 21 Cal. 87; *Althof v. Conheim*, 38 Cal. 230; 99 Am. Dec. 363; *Meyer v. Kinzer*, 12 Cal. 247; 73 Am. Dec. 538; *Ramsdell v. Fuller*, 28 Cal. 37; 87 Am. Dec. 103; *Adams v. Knowlton*, 22 Cal. 283; *Riley v. Pehl*, 23 Cal.



wife, yet, if acquired after marriage, it may be, and will be presumed to be, community property, of which the husband has the power of disposition. If the wife should join in the deed with her husband, of property standing in her name, but which is community property, the fact that the certificate of acknowledgment is defective, cannot affect the validity of the conveyance, for the reason that her signature is unnecessary. "As the property belonged to the community, it was subject to the disposition of the husband. He was possessed of the same absolute power over it as over his separate estate. He could sell it without the concurrence or consent of his wife. It is of no moment, therefore, that the deed to the plaintiff was recorded with the defective certificate of her acknowledgment. Her signature to the instrument was unnecessary, for it could add nothing to the validity or completeness of the transfer. The entire estate passed upon the execution of the deed by the husband alone."<sup>1</sup>

§ 574. **Married woman acting as a feme sole.**—As it is an established rule that a married woman cannot be divested of her title to land by an estoppel *in pais*, the question of the effect of her deed, executed and acknowledged by her in the character of a *feme sole*, when she is in reality a married woman, is one that is not free from difficulty. Where she is guilty of no positive, express misrepresentation, and the party with whom she is dealing has the means of ascertaining her *status*, it is difficult to see what element of fraud or deceit enters into the transaction to bind her by her act. Still it is manifestly unjust where she holds herself out as an unmarried woman to allow her to claim, against an innocent purchaser, that a

70; *Peck v. Brummagin*, 31 Cal. 440; 89 Am. Dec. 195; *Nott v. Smith*, 16 Cal. 533; *Lewis v. Lewis*, 18 Cal. 654; *Parry v. Kelly*, 52 Cal. 334; *Eslinger v. Eslinger*, 47 Cal. 62.

<sup>1</sup> *Pixley v. Huggins*, 15 Cal. 127, 131, per Field, C. J. See *Landers v. Bolton*, 26 Cal. 420; *Tom v. Sayers*, 64 Tex. 339; *Stephens v. Mathews*, 69 Tex. 341.

deed acknowledged by her in the capacity of a *feme sole* is void because she, at the time of its execution, was married. This latter view is the one that has found favor with the courts as being best supported by reason. Accordingly, where a decree of divorce is obtained by a married woman, which is void, but she takes her maiden name, acts as and represents herself for a long period of time to be a married woman, and lives apart from her husband, a deed of her separate real estate, acknowledged by her as an unmarried woman, it has been decided, is sufficient to pass her title.<sup>1</sup> So where a married woman left her husband in England, and formed a meretricious union in California, and for fifteen years lived with her paramour, and executed to him deeds of certain lots of land, to which deeds the certificate of acknowledgment was in the form of that of a *feme sole*, and not in that prescribed by the statute for the acknowledgment of deeds executed by married women, it was held that she had estopped herself by her conduct from calling to her aid the statutes relating to the acknowledgment of deeds by married women, for the purpose of defeating her deeds, in an

<sup>1</sup> *Reis v. Lawrence*, 63 Cal. 129; 49 Am. Rep. 83. Said Ross, J., in delivering the opinion of the majority of the court: "Of course, under such circumstances, the reason for the rule that requires, in cases of married women, the certificate of acknowledgment to recite an examination without the hearing of her husband, does not exist. At least, as early as July, 1872, the defendant Fanny lived apart from and independent of her husband. Later on, in 1873, she resumed her maiden name, and thence hitherto acted and represented herself as a single woman. In that character, she executed the instruments in question, and in that character, in our opinion, a court of equity ought to regard her in the construction of them. As giving support to these views, see *Richeson v. Simmons*, 47 Mo. 20; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Patterson v. Lawrence*, 90 Ill. 174; 32 Am. Rep. 22." Justices McKee and Thornton dissented. See, also, *Hector v. Knox*, 63 Tex. 613; *Clements v. Ewing*, 71 Tex. 370; *Wright v. Hays*, 10 Tex. 130; *Cheek v. Bellows*, 17 Tex. 613; 67 Am. Dec. 686; *Fullerton v. Doyle*, 18 Tex. 4; *Kelley v. Whitmore*, 41 Tex. 648; *Delafield v. Brady*, 108 N. Y. 524; *Piper v. May*, 51 Ind. 283. But she cannot convey as a *feme sole*, because of the fact of her husband's insanity: *Heidenheimer v. Thomas*, 63 Tex. 287.

action to quiet title.<sup>1</sup> If ejectment may be maintained, the purchase money should be first tendered back.<sup>2</sup>

§ 575. **Comments.**—In both of these cases dissenting opinions were filed, and it seems to us that these, considered with reference to the language of the statutes, are best supported by legal reasoning. It, indeed, is hard to say that a conveyance of a woman representing herself to be unmarried, is void, because she is in fact married, although the grantee may not have the slightest knowledge or intimation of this fact. Yet the law has seen fit to say that a married woman shall convey her property in one way and in no other. The only question that should be solved is, is she a *married woman*? When her *status* is determined, her deed to have effect must, it seems to us, under the statute, be acknowledged in the manner prescribed. Without this acknowledgment, it is a nullity. While it is manifestly unjust to deprive a man acting in good faith of his property by an arbitrary rule of law, yet if that is the law, the hardship of an individual case ought not to be considered. It, perhaps, is only a question of time when all restrictions on the power of married women to convey will be removed. She should be allowed to convey as if she were unmarried. But until these restrictive statutes have been repealed, they should be upheld and enforced.<sup>3</sup>

<sup>1</sup> *Hand v. Hand*, 68 Cal. 135; 58 Am. Rep. 5. The same conclusion was reached and these decisions approved in *Ramboz v. Stowell*, 103 Cal. 588. Ross, J., concurring, said: "I agree that the plaintiff should be regarded as a single woman. The property to which she asserts title was acquired by her in this State. Her husband has never been within the United States. For twenty odd years she has repudiated her marital relations, and conducted herself without regard to them. Under such circumstances to permit her to fall back upon them, and render void her deed on the ground that the certificate of the notary does not recite that she was examined 'separate and apart' from her husband, with whom she has held no relations for more than twenty years, and who has never been in this country, seems to me to be beyond all reason." Mr. Justice McKee filed a dissenting opinion.

<sup>2</sup> *Danner v. Berthold*, 11 Mo. App. 351.

<sup>3</sup> See in this connection *Rhea v. Rhenner*, 1 Pet. 105.

## CHAPTER XXI.

### REGISTRY LAWS OF THE SEVERAL STATES.

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§ 620. Washington.

§ 621. West Virginia.

§ 622. Wisconsin.

§ 623. Wyoming.

§ 624. Effect of statutes giving time to record deed—Valid from delivery.

§ 625. Protection of grantee.

**§ 576. Statutory provisions.**—The statutes of the different States are not uniform as to the time prescribed within which conveyances should be or are required to be recorded. In some of the States, it is provided by statute that the registration of a deed is effective as constructive notice from the time only when it is filed for record. In other States, the statutes allow a purchaser a specified time after the execution of the deed in which to have it recorded. The subject of registration is an important one, and many decisions are based alone upon the particular language of the statute. For the purpose of enabling the reader to determine whether a decision is founded upon the peculiar phraseology, or some special provision of a statute of a particular State, as well as to furnish him with an idea of the reason for the conflict among the decisions that will frequently be found in the various questions arising from the registry laws, it has been considered advisable to give an abstract of the statutes of the different States relative to the registration of deeds. With the exceptions above noted, however, the statutes show a general uniformity. All have registry laws and the tendency is toward uniformity. Recent legislation tends to remove the necessity for a married woman acknowledging a deed in a manner different from that required of an unmarried woman. It is not our purpose, in the following sections, to give all the statutory

provisions complete, as such a compilation would serve no useful purpose. Our object is simply to show the salient points of the statutes which the courts have examined and construed when deciding cases involving the registry laws. In some instances a statute has been given verbatim, although changes may have since been made, when it would seem that decisions were based upon the particular language used. In such case the date is given when the statute was in force. Changes that have been made are generally to abolish the provisions giving a specified time to record conveyances. But, inasmuch as many decisions have been based upon former statutes, it is important to know their substance, and hence it has been deemed advisable to give them as they were when decisions founded upon them might seem to be in conflict with the decisions of other States.

§ 577. **Alabama.**—Unless recorded within a specified time from their date, all conveyances of unconditional estates and mortgages, or instruments in the nature of mortgages of real property, to secure any debt created at their date, formerly were void as against purchasers for a valuable consideration, mortgagees, and judgment creditors without notice.<sup>1</sup> But all other conveyances of real property, mortgages, or deeds of trust, to secure any debts other than those above enumerated, are, as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice, inoperative and void, unless recorded before the accrual of the rights of such persons. But all such conveyances are perfectly valid without registration as between the parties themselves, and against creditors whose claims have not been put into judgments. Conveyances must be recorded in the county in which the land lies, in the office of the judge of probate. The conveyance is operative as a record from the day on which

<sup>1</sup> Rev. Code, §§ 1810–1812. See Alabama Civil Code, § 2168, before revision of 1886. But a change is now made by omission of specified time from Code.

it is delivered to the judge. And the recording in the proper office of any deed or conveyance of property which may be legally admitted to record, operates as notice of such conveyance, without any acknowledgment or probate.<sup>1</sup>

§ 578. **Arizona.**—Conveyances are valid between the parties without registration, and are required to be recorded in the county in which the land is situated. The record, when duly made, imparts notice to all of the contents of the deed from the time it is delivered to the recorder, and all subsequent purchasers and mortgagees are considered purchasers with notice.<sup>2</sup>

§ 579. **Arkansas.**—Every deed or instrument affecting the title in law or in equity to any property which is entitled to record, is constructive notice to all persons from the time such conveyance is filed for record in the office of the recorder of the proper county. The recorder is required to indorse on the instrument the precise time when it was filed for record.<sup>3</sup> No conveyance is good or valid against subsequent purchasers for valuable consideration, without actual notice, or against any creditor of the grantor, obtaining a judgment or decree, which may be a lien upon the real estate described in such conveyance, unless such conveyance shall be filed, after acknowledgment, for record in the recorder's office of the county where such land is situated.<sup>4</sup> A mortgage is a lien on the mortgaged property from the time the same is filed in the recorder's office, and not before.<sup>5</sup>

<sup>1</sup> See *Gray's Administrators v. Cruise*, 36 Ala. 559; *Coster v. Bank of Georgia*, 24 Ala. 37; *Jordan v. Mead*, 12 Ala. 247; *Wyatt v. Stewart*, 34 Ala. 716; *De Vendal v. Malone*, 25 Ala. 272; *Wallis v. Rhea*, 10 Ala. 451; *Boyd v. Beck*, 29 Ala. 703; *Dearing v. Watkins*, 10 Ala. 20; *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 866; *Andrews v. Burns*, 11 Ala. 691; *Center v. P. & M. Bank*, 22 Ala. 473; *Daniel v. Sorrells*, 9 Ala. 436; *Smith v. Branch Bank of Mobile*, 21 Ala. 125; *Rev. Code*, § 1810, et seq; 3 *Rev. Stats.*, §§ 2601, 2602.

<sup>2</sup> *Rev. Stats.* 1887; *Comp. Laws* 1877, §§ 2268, 2269.

<sup>3</sup> § 6.

<sup>4</sup> See *Hamilton v. Foulkes*, 16 Ark. 340; *Byers v. Engles*, 16 Ark. 543.

<sup>5</sup> *Dig. of Stats.* § 656, et seq. See *Jacoway v. Gault*, 20 Ark. 190; 73 *Am. Dec.* 494. See, also *Sandels & Hill's Dig.* 1894.

§ 580. **California.**—A deed is conclusive against the grantor and all persons subsequently claiming under him, except purchasers or encumbrancers acquiring, in good faith and for a valuable consideration, a title or lien by an instrument which is first duly recorded.<sup>1</sup> A conveyance is constructive notice of the contents to subsequent purchasers and mortgagees from the time it is filed with the recorder for record.<sup>2</sup> A deed is void against subsequent purchasers or mortgagees of the same property, or any part thereof, in good faith and for value, whose conveyances are first duly recorded.<sup>3</sup> Unrecorded instruments, however, are valid between the parties and those having notice.<sup>4</sup> And powers of attorney when recorded can be revoked only by an instrument recorded in the same office in which the power of attorney is recorded.<sup>5</sup> An assignment of a mortgage may be recorded, and the record operates as notice to all persons subsequently acquiring title from the assignor.<sup>6</sup> When a deed absolute in form is intended as a mortgage, or to be defeasible on the performance of certain conditions, the deed is not defeated or affected as against any other persons than the grantee, his heirs or devisees, or persons having actual notice, unless the defeasance is recorded in the office of the recorder of the county where the land lies.<sup>7</sup> The recording of an assignment of a mortgage is not of itself notice to the mortgagor so as to invalidate any payment made by him to the mortgagee.<sup>8</sup>

<sup>1</sup> Civil Code, § 1107.

<sup>2</sup> Civil Code, § 1213.

<sup>3</sup> Civil Code, § 1214.

<sup>4</sup> Civil Code, § 1217.

<sup>5</sup> Civil Code, § 1216.

<sup>6</sup> Civil Code, § 2934.

<sup>7</sup> Civil Code, § 2950.

<sup>8</sup> Civil Code, § 2935. See, generally, on the subject of registration, *Bird v. Dennison*, 7 Cal. 297; *Woodworth v. Guzman*, 1 Cal. 203; *Landers v. Bolton*, 26 Cal. 393; *Jones v. Marks*, 47 Cal. 242; *Fogarty v. Sawyer*, 23 Cal. 570; *Vassault v. Austin*, 36 Cal. 691; *Patterson v. Donner*, 48 Cal. 369; *Smith v. Yule*, 31 Cal. 180; 89 Am. Dec. 167; *Odd Fellows' Sav. Bank v. Banton*, 46 Cal. 603; *Lawton v. Gordon*, 37 Cal. 202; *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543; *O'Rourke v. O'Connor*, 39 Cal.



§ 581. **Colorado.**—Conveyances are recorded in the office of the recorder of the county in which the land is situated, and take effect as to subsequent *bona fide* purchasers and encumbrancers by mortgage, judgment, or otherwise, not having notice thereof from the time of filing for record, and not before.<sup>1</sup> Deeds and other conveyances are deemed, from the time of filing for record, notice to subsequent purchasers or encumbrancers, though not acknowledged or proven according to law. But neither they nor the record can be read in evidence, unless such conveyances are subsequently acknowledged or proved according to law, or their execution be proved in the same manner as other writings.<sup>2</sup>

§ 582. **Connecticut.**—No conveyance, unless recorded in the records of the town in which the land is situated, is effectual against any other person than the grantor and his heirs. The town clerk is required to note on the deed the day and year when he received it. When once received it shall not be delivered up again until it is recorded. If a deed is executed under a power of attorney, the latter must be recorded with the deed. When a conveyance of land lying in two or more towns is recorded in one or more of such towns, and is afterward lost, a certified copy of the record may be recorded in the other towns, and have the same effect as a record of the original. "An acknowledged deed, and any instrument intended as a conveyance of lands, but which, by reason of a formal defect, shall operate only as a conveyance of an equitable interest in such lands, and contracts for the conveyance of lands, or of any interest therein, and all instru-

442; *Snodgrass v. Ricketts*, 13 Cal. 359; *Thompson v. Pioche*, 44 Cal. 508; *Mahoney v. Middleton*, 41 Cal. 41; *Fair v. Stevenot*, 29 Cal. 486; *Wilcoxson v. Donner*, 49 Cal. 193; *Frey v. Clifford*, 44 Cal. 335; *Dennis v. Burritt*, 6 Cal. 670; *Long v. Dollarhide*, 24 Cal. 218; *Packard v. Johnson*, 51 Cal. 545; *McMinn v. O'Connor*, 27 Cal. 238; *Call v. Hastings*, 3 Cal. 179; *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260; *McCabe v. Grey*, 20 Cal. 509.

<sup>1</sup> Gen. Laws, § 176 (ch. 18, § 17).

<sup>2</sup> Gen. Laws, § 178.

ments by which an equitable interest in lands is created, in which such lands are particularly described, may be recorded in the records of the town in which such lands are; and such record shall be notice to all the world of the equitable interest thus created." All conveyances of which the grantor is ousted by the possession of another are void unless made to the person in actual possession.<sup>1</sup> But the possession by a mortgagee is not considered as being adverse.<sup>2</sup> Although a deed may not be recorded till after the death of the grantor, it is good as against a purchaser from his heir.<sup>3</sup> An action lies against the clerk for delivering up a deed before it is recorded.<sup>4</sup>

§ 583. **Dakota, North and South.**—Since the issuance of the first edition, Dakota Territory has been divided into North and South Dakota, and both have been admitted as States. For the laws of these States relating to the registry laws see the sections on North Dakota and South Dakota.

§ 584. **Delaware.**—Deeds shall be recorded in the recorder's office for the county in which the land is situated, if lodged in such office within one year after the day of the sealing and delivery of such deed.<sup>5</sup> The registration of a deed in one county has effect only to lands mentioned in the deed situate in such county.<sup>6</sup> If a deed is not recorded in the proper office within one year after

<sup>1</sup> Gen. Stats. §§ 2961–2966.

<sup>2</sup> Sanford v. Washburn, 2 Root, 499. See generally Ray v. Bush, 1 Root, 81; Franklin v. Cannon, 1 Root, 500; Hartmeyer v. Gates, 1 Root, 61; Beers v. Hawley, 2 Conn. 467; Hine v. Robbins, 8 Conn. 342; Wheaton v. Dyer, 15 Conn. 307; Hinman v. Hinman, 4 Conn. 575; Welch v. Gould, 2 Root, 287; Judd v. Woodruff, 2 Root, 298; Hall's Heirs v. Hall, 2 Root, 383; Dickenson v. Glenney, 27 Conn. 104; Summer v. Rhoda, 14 Conn. 135; Watson v. Wells, 5 Conn. 468; Carter v. Champion, 8 Conn. 549; 21 Am. Dec. 695.

<sup>3</sup> Hill v. Meeker, 24 Conn. 211.

<sup>4</sup> Wells v. Hutchinson, 2 Root, 85. See Hine v. Robbins, 8 Conn. 342.

<sup>5</sup> Laws Rev. Code, p. 504, § 14. But see the change made in Delaware by act, vol. 17, c. 213.

<sup>6</sup> Laws, Rev. Code, p. 503, § 15.

the day of the sealing and delivery, "it shall not avail against a subsequent fair creditor, mortgagee, or purchaser for a valuable consideration," unless it shall be shown that the creditor when giving the credit, or the mortgagee or purchaser when advancing the consideration, had notice of such deed.<sup>1</sup> A purchase money mortgage recorded within sixty days after its execution has preference over any judgment against the mortgagor, or any other lien created by him, although the same may be of a date prior to the mortgage.<sup>2</sup> Where there is an absolute conveyance and a defeasance or reconveyance, the person to whom such conveyance is made shall cause to be indorsed thereon and recorded with it, a note stating that there is such a defeasance and its general purport, else the recording of such conveyance shall be of no effect; and such defeasance must be duly acknowledged and recorded in the recorder's office of the county in which the land lies, within sixty days after the day of making the same, or it shall be of no avail against a fair creditor, mortgagee, or purchaser for a valuable consideration, from the person to whom the conveyance is made, unless such persons had notice at the time of giving credit or parting with the consideration.<sup>3</sup> Though the acknowledgment to deeds may be defective, record of such deeds if dated prior to January 1, 1880, duly signed and sealed by the grantor, will be admitted in evidence as valid.<sup>4</sup>

**§ 585. District of Columbia.**—Deeds are recorded in the office of the recorder. All deeds which are recorded within six months after delivery, with the exception of trust deeds and mortgages, take effect as to all persons from the time of their acknowledgment or proof. Deeds of trust and mortgages, without regard to the time at which they are delivered for record, and all other con-

<sup>1</sup> Laws, Rev. Code, p. 504, § 17.

<sup>2</sup> Laws, Rev. Code, p. 505, § 21.

<sup>3</sup> Laws, Rev. Code, 1874, p. 504, § 18.

<sup>4</sup> Del. Laws, 1893, p. 1116.

veyances which are delivered after the expiration of six months from the time of their delivery, take effect as against subsequent purchasers for a valuable consideration without notice, and creditors, only from the time that such deed of trust, mortgage, or other conveyance, shall have been delivered to the recorder for record after its proper acknowledgment. When two or more deeds embracing the same land are filed for record on the same day, the one first sealed and delivered has the preference.<sup>1</sup>

**§ 586. Florida.**—No conveyance is good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless it is recorded in the office assigned by law for that purpose. No conveyance of any character made by virtue of a power of attorney, is good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the execution of such power of attorney is duly proved before the recording officer of the county in which the land is situated, and recorded at the time of recording the deed made in pursuance of it. But the recorder is not authorized to refuse to record any conveyance offered for record, the execution of which is duly proved.<sup>2</sup>

**§ 587. Georgia.**—“Every deed conveying lands shall be recorded in the office of the clerk of the superior court where the land lies, within one year from the date of such deed. On failure to record within this time, the record may be made at any time thereafter; but such deed loses its priority over a subsequent deed from the same vendor, recorded in time, and taken without notice of the existence of the first.”<sup>3</sup> A registered deed is admitted in evidence without further proof, unless the grantor, or one of his heirs, or the adverse party in the suit, will file an affidavit that the deed to the best of his knowledge and belief

<sup>1</sup> Rev. Stats., 1874, pp. 52, 53.

<sup>2</sup> Dig. of Laws, pp. 215–219.

<sup>3</sup> Code, 1873 (Irwin, Lester & Hill), § 2705; Code, 1883, § 2705.

is a forgery, when the court will arrest the cause and try the issue as to the genuineness of such alleged deed.<sup>1</sup> A mortgage must be recorded within three months from its date, and if not so recorded, while remaining valid as against the mortgagor, it is postponed to all other liens created or obtained, or purchases made prior to the time the mortgage is actually recorded. If the purchaser has notice of the prior unrecorded mortgage the lien of such mortgage is good as against him.<sup>2</sup> A mortgage which is recorded in an improper office, or without due acknowledgment, or recorded so defectively as not to give notice to a prudent inquirer, is not notice to subsequent *bona fide* purchasers or encumbrancers. But the record is not vitiated by a mere formal mistake.<sup>3</sup> Though a mortgage is not recorded within the time prescribed, it is notice to all the world from the time at which it is recorded.<sup>4</sup> The law as above stated on which many decisions are based, has been modified by the act of October 1, 1889, providing that conveyances take effect only from the time at which they are filed for record in the clerk's office as against third persons who act in good faith and without notice, and the clerk is required to note on the instrument the day and hour when it was filed for record.

§ 588. **Idaho.**—Every conveyance to operate as notice to third persons must be recorded in the office of the recorder of the county in which the land lies, but is valid between the parties without such record. Every conveyance imparts notice to all persons of its contents from the

<sup>1</sup> Code, 1873, § 2712. See *Benson v. Green*, 80 Ga. 230.

<sup>2</sup> Code, 1873, § 1957.

<sup>3</sup> Code, 1873, § 1959.

<sup>4</sup> Code, 1873, § 1960; Code, 1883, § 1960. See generally on the registry acts, *Felton v. Pitman*, 14 Ga. 536; *Allen v. Holding*, 29 Ga. 485; s. c. 32 Ga. 418; *Hardaway v. Semmes*, 24 Ga. 305; *Wyatt v. Elam*, 19 Ga. 335; *Williams v. Adams*, 43 Ga. 407; *Lee v. Cato*, 27 Ga. 637; 73 Am. Dec. 746; *Herndon v. Kimball*, 7 Ga. 432; 50 Am. Dec. 406; *Burkhalter v. Ector*, 25 Ga. 55; *Williams v. Logan*, 32 Ga. 165; *Rushin v. Shilds*, 11 Ga. 636; 56 Am. Dec. 436; *Andrews v. Mathews*, 59 Ga. 466; *Myers v. Picquet*, 61 Ga. 260.

time the same is filed with the recorder for record, and subsequent purchasers are deemed to purchase with notice. Every conveyance not so recorded is void against subsequent purchasers in good faith and for a valuable consideration, whose conveyances are first duly recorded.<sup>1</sup> A revocation of a recorded power of attorney shall not be valid until such revocation is deposited for record in the same office in which the power of attorney is recorded.<sup>2</sup>

§ 589. **Illinois.**—Deeds, mortgages, and other conveyances authorized to be recorded, take effect from the time they are filed for record and not before, as to creditors and purchasers without notice. Although deeds may not be acknowledged according to law, they are deemed, from the time of being filed for record, notice to subsequent purchasers and encumbrancers, but they are not entitled to be read in evidence, unless their execution be proved in the mode required by the rules of evidence, so as to supply the defects of such acknowledgment.<sup>3</sup>

§ 589 a. **Indian Territory.**—With the exception of the Quapaw Agency the title to land is still in the United States, and the different Indian tribes hold their reservations in common under patent from the Federal Government. Allotments have been taken by nearly all the affiliated tribes of the Quapaw Agency, and with the exception of lots in this agency, and in the townsite of Miami, citizens of the United States cannot own land but must hold as tenants of some Indian landlord.

§ 590. **Indiana.**—Conveyances are recorded in the recorder's office of the county where the land lies, and if not recorded within forty-five days from their execution they are fraudulent and void as against any subsequent

<sup>1</sup> Rev. Laws, §§ 24-26.

<sup>2</sup> Rev. Laws, § 28.

<sup>3</sup> Rev. Stats. 1845, p. 109, §§ 23, 28; Rev. Stats. 1877, c. 30, §§ 30, 31; Rev. Stats. by Hurd (1880), p. 271, § 30; Rev. Stats. by Hurd (1883), p. 284, § 2831. See Hurd, 371, et seq.

purchaser, lessee, or mortgagee in good faith and for a valuable consideration.<sup>1</sup> When a deed absolute in form is intended as a mortgage, the original deed is not defeated as against any person other than the maker, or his heirs or devisees, or persons having actual notice, unless the defeasance shall have been recorded according to law within ninety days after the date of the deed.<sup>2</sup> Each recorder is required to keep a book, each page of which shall be divided into five columns, with the following heads:—

Date of Reception.	Names of Grantors.	Names of Grantees.	Description of Lands.	Vol. and page where recorded.
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The recorder is required to enter in this book all deeds left with him for record, noting in the first column the day and hour the deed was received, and the other particulars in the other columns. Every deed is considered as recorded at the time so noted.<sup>3</sup>

**§ 591. Iowa.**—Deeds are recorded in the county in which the land lies, and are of no validity as against subsequent purchasers without notice, unless so recorded. To entitle them to registration they must be duly acknowledged or proved.<sup>4</sup>

**§ 592. Kansas.**—Deeds are recorded in the office of the register of deeds of the county in which the real es-

<sup>1</sup> See *Reasoner v. Edmundson*, 5 Ind. 393; *Wright v. Shepherd*, 47 Ind. 176, 179; *Faulkner v. Overturf*, 49 Ind. 265; *Tresler v. Tresler*, 38 Ind. 282, 285; *Brannan v. May*, 42 Ind. 92, 96.

<sup>2</sup> Stats. Revision of 1876, p. 365, § 17; Ind. Rev. Stats., § 2931.

<sup>3</sup> Stats. Revision of 1876, p. 367, § 29; 1881, § 2931. See, also, Rev. Stats. 1888.

<sup>4</sup> Code of 1873, §§ 1941, 1942, and Rev. Code of 1880, by Miller (1880), § 1941; 1884, p. 1941, § 194. On the question of notice and subsequent purchasers, see *Miller v. Bradford*, 12 Iowa, 14; *Stewart v. Huff*, 19 Iowa, 557; *Calvin v. Bowman*, 10 Iowa, 529; *Suiter v. Turner*, 10 Iowa, 517; *Willard v. Cramer*, 36 Iowa, 22; *Gower v. Doheney*, 33 Iowa, 36; *Scoles v. Wilsey*, 11 Iowa, 261; *Brinton v. Seevers*, 12 Iowa, 389; *Bostwick v. Powers*, 12 Iowa, 456; *Breed v. Conley*, 14 Iowa, 269; 81 Am. Dec. 485; *Haynes v. Seacrest*, 13 Iowa, 455; *Stewart v. Huff*, 19 Iowa, 557; *Dar-*



tate is situated. A deed imparts notice to all persons of its contents from the time it is filed with the register of deeds for record, subsequent purchasers being deemed to purchase with notice.<sup>1</sup> A deed is not valid except as between the parties thereto, and such as have actual notice, until it is deposited with the register of deeds for record.<sup>2</sup> A power of attorney should be recorded previous to the sale or the execution of the deed made under it, and when once recorded shall not be deemed to be revoked by any act of the party by whom it was made, until the instrument of revocation is filed in the recorder's office for record.<sup>3</sup>

§ 593. **Kentucky.**—Where a conveyance made by virtue of a power is required to be recorded to make it valid against creditors and purchasers, the power must be recorded in the same manner.<sup>4</sup> Where the power of attorney is not recorded, the registration of the deed will not operate as constructive notice.<sup>5</sup> “Deeds made by residents of Kentucky, other than deeds of trust and mortgages, shall not be good against a purchaser for a valuable consideration, not having notice thereof, or any creditor, except from the time the same shall be legally lodged for record, unless the same be so lodged within sixty days from the date thereof. If made by persons residing out of Kentucky, and in the United States, within four months; if out of the United States, within twelve

*gin v. Beeker*, 10 Iowa, 571; *Bringholff v. Munzenmaier*, 20 Iowa, 513; *Koons v. Grooves*, 20 Iowa, 373; *Gardner v. Cole*, 21 Iowa, 205.

<sup>1</sup> See *Simpson v. Munde*, 3 Kan. 172; *Brown v. Simpson*, 4 Kan. 76; *Claggett v. Crall*, 12 Kan. 397; *Wickersham v. Zinc Co.*, 18 Kan. 487; 26 Am. Rep. 784.

<sup>2</sup> Comp. Laws (Dassler), p. 212, § 1044. See also Gen. Stats. 1134. See *Coon v. Browning*, 10 Kan. 85; *Simpson v. Munde*, 3 Kan. 172; *Gray v. Ulrich*, 8 Kan. 112; *Swarts v. Stees*, 2 Kan. 236; 85 Am. Dec. 588; *School District v. Taylor*, 19 Kan. 287; *Johnson v. Clark*, 18 Kan. 157, 164; *Jones v. Lapham*, 15 Kan. 140.

<sup>3</sup> Comp. Laws (Dassler), §§ 1046, 1047. See Gen. Stats. 1134.

<sup>4</sup> Gen. Stats. 1873 (Bullock & Johnson), p. 256, § 13.

<sup>5</sup> *Graves v. Ward*, 2 Duval, 301.

months.”<sup>1</sup> Although a deed be not filed for record within eight months, it is still good against a subsequent purchaser with notice, and if the purchaser be a married woman, notice to her husband is likewise notice to her.<sup>2</sup>

§ 594. **Louisiana.**—Conveyances, while valid between the parties and their heirs, are void as to third persons, unless publicly inscribed on the records of the parish, and they become operative as to such persons from the time they are filed for record.<sup>3</sup> For the purpose of rendering a search for mortgages for a period further back than ten years unnecessary, it is required that before the expiration of this time the inscription shall be renewed.<sup>4</sup>

§ 595. **Maine.**—A deed is not effectual as against any person except the grantor, his heirs and devisees, and persons having actual notice, unless it is recorded.<sup>5</sup> A deed absolute in form cannot be defeated by a defeasance, as against any other person than the maker, his heirs and devisees, unless such defeasance is recorded in the same office as the deed.<sup>6</sup>

§ 596. **Maryland.**—Deeds must be recorded within six months from their date in the county in which the land lies, and when it lies in more than one county, or the city of Baltimore and a county, then in all the counties in which it is situated.<sup>7</sup> Every deed, after due acknowledg-

<sup>1</sup> Gen. Stats, 1873, p. 257, § 14; Gen. Stats. 1883, p. 257, § 14. But this distinction was abolished in 1893. See Acts 1893, c. 186, § 7; Stats. 1894, § 496.

<sup>2</sup> *Bennett v. Tetherington*, 6 Bush, 192. See, also, Ky. Stats., § 494.

<sup>3</sup> Rev. Code, § 2266.

<sup>4</sup> Rev. Code, § 3342. See, also, Ky. Stats., § 494.

<sup>5</sup> Rev. Stats. 1871, p. 560, § 8; Rev. Stats. 1883, p. 604, § 8. See *Merrill v. Ireland*, 40 Me. 569; *Lawrence v. Tucker*, 7 Me. 195; *Porter v. Sevey*, 43 Me. 519; *Kent v. Plummer*, 7 Me. 464; *Goodwin v. Cloudman*, 43 Me. 577; *Pierce v. Taylor*, 23 Me. 246; *Rackleff v. Norton*, 19 Me. 274; *Hanly v. Morse*, 32 Me. 287; *Veazie v. Parker*, 23 Me. 170; *Spofford v. Weston*, 29 Me. 140; *Butler v. Stevens*, 26 Me. 484; *Roberts v. Bourne*, 23 Me. 165; 39 Am. Dec. 614.

<sup>6</sup> Rev. Stats. 1871, p. 560, § 9.

<sup>7</sup> Rev. Code, § 16.

ment and registration, takes effect as between the parties from its date, and no deed is valid for the purpose of passing title, unless acknowledged and recorded as provided by statute.<sup>1</sup> When there are two or more deeds for the same land, the deed first recorded, according to law, is preferred, if made *bona fide* and upon a good and valuable consideration.<sup>2</sup> If the recording officer should die, and during the interim between his death and the qualification of his successor the time for recording a deed should expire, the successor of the deceased clerk shall record the same at any time within one month after his qualification, and such record will have the same effect as if the deed were recorded within the prescribed time. The succeeding clerk shall, however, indorse thereon the time of the death of the former clerk, and the date of his own qualification, and this indorsement shall be recorded with the deed.<sup>3</sup> Conveyances, except deeds or conveyances by way of mortgages, may be recorded after the time prescribed by statute, and when so recorded, have, as against the grantor, his heirs, or executors, and against all purchasers with notice and against creditors, who shall become so after the recording of such conveyance, the same effect as if recorded within the prescribed time.<sup>4</sup> Where possession is taken, a deed after being recorded (though not recorded within six months), has against all persons from the time of taking possession, the same effect as if recorded in proper time;<sup>5</sup> but as against all creditors who have become so before the recording of the deed, and without notice of its existence, it has effect only as a contract to convey.<sup>6</sup>

<sup>1</sup> Rev. Code, §§ 17, 18. See *Byles v. Tome*, 39 Md. 461; *Hoopes v. Knell*, 31 Md. 550; *Building Assn. v. Willson*, 41 Md. 514; *Cooke's Lessee v. Kell*, 13 Md. 469.

<sup>2</sup> Rev. Code, § 19.

<sup>3</sup> Rev. Code, § 21.

<sup>4</sup> Rev. Code, § 22.

<sup>5</sup> Rev. Code, § 23.

<sup>6</sup> Rev. Code, 1878, § 24. See, generally, on these sections, *Abrams v. Sheehan*, 40 Md. 446; *Walsh v. Boyle*, 30 Md. 267; *Owens v. Miller*, 29 Md. 144; *Glenn v. Davis*, 35 Md. 215; 6 Am. Rep. 389; *Estate of Lei-*

§ 597. **Massachusetts.**—Deeds are not valid as against persons other than the grantor, his heirs and devisees, and persons having actual notice, unless they are recorded in the registry of deeds for the county in which the land is situated.<sup>1</sup> An absolute deed is not affected by a defeasance as against any other person than the maker of the defeasance, his heirs and devisees, and persons having actual notice, unless such defeasance is recorded in the registry of deeds for the county in which the real estate is situated.<sup>2</sup>

§ 598. **Michigan.**—Every register of deeds is required to keep an entry book of deeds, divided into six columns, as shown in the note.<sup>3</sup> Every conveyance which is not recorded as provided by statute is void as against subsequent purchasers in good faith and for a valuable consideration, whose conveyances are first duly recorded.<sup>4</sup> An

man, 32 Md. 225; 3 Am. Rep. 132; *Administrators of Carson v. Phelps*, 40 Md. 97; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Lester v. Hardesty*, 29 Md. 50; *Wiliard's Executors v. Ramsburg*, 22 Md. 206; *Horner v. Greoholz*, 38 Md. 521; *Kane v. Roberts*, 40 Md. 590; *Leppoc v. National Union Bank*, 32 Md. 136; *Cockey v. Milne's Lessee*, 16 Md. 207; *Busey v. Reese*, 38 Md. 264.

<sup>1</sup> Pub. Stats. 1882, p. 732, § 4; Gen. Stats. 1860, p. 466, § 3. See *Stetson v. Gulliver*, 2 Cush. 494; *Lawrence v. Stratton*, 6 Cush. 163; *Parker v. Osgood*, 3 Allen, 487; *Sibley v. Leffingwell*, 8 Allen, 584; *George v. Kent*, 7 Allen, 16; *Lamb v. Pierce*, 113 Mass. 72; *Faxon v. Wallace*, 101 Mass. 444; *Earle v. Fiske*, 103 Mass. 491; *State of Connecticut v. Bradish*, 14 Mass. 296; *Adams v. Cuddy*, 13 Pick. 460; 25 Am. Rep. 330; *Glidden v. Hunt*, 24 Pick. 221; *Flynt v. Arnold*, 2 Met. 619; *Dole v. Thurlow*, 12 Met. 157, 163; *Pomroy v. Stevens*, 11 Met. 244; *Curtis v. Mundy*, 3 Met. 405; *Marshall v. Fisk*, 6 Mass. 24; 4 Am. Dec. 76; *Stewart v. Clark* 13 Met. 79.

<sup>2</sup> Pub. Stats. 1882, p. 734, § 23; Gen. Stats. 1860, c. 89, § 15. See *Foote v. Hartford Ins. Co.*, 119 Mass. 259; *Bayley v. Bailey*, 5 Gray, 505.

<sup>3</sup> Howell's Annotated Stats. 1882, vol. 2, p. 1469, c. 216, § 5674. The form prescribed is as follows:

Date of Reception.	Grantors.	Grantees.	Township where the land lies.			To whom delivered [after being recorded] and date [of delivery].	Fees received.
			Town.	Range.	Section.		

<sup>4</sup> Howell's Annotated Stats., vol. 2, p. 1473, § 29; Comp. Laws, 1871, pp. 1345, 1346.

absolute deed, defeasible on the performance of certain conditions, is not affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless such defeasance is properly recorded.<sup>1</sup> A revocation of a recorded power of attorney must also be recorded.<sup>2</sup>

**§ 599. Minnesota.**—Deeds are recorded in the office of the register of deeds where the real estate is situated; and every deed not so recorded is void as against any subsequent purchaser, in good faith and for a valuable consideration, whose conveyance is first duly recorded, or as against any attachment levied on the property, or any judgment lawfully obtained at the suit of one against the person in whose name the record title was prior to the recording of the conveyance.<sup>3</sup> The term “purchaser” includes every person to whom any interest in real estate is conveyed for a valuable consideration, and also every assignee of a mortgage, lease, or other conditional estate.<sup>4</sup> A certified copy of the record of a deed may be recorded in any county in the State, with the same force and effect as the original conveyance would have if so recorded.<sup>5</sup>

**§ 600. Mississippi.**—Conveyances are void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless acknowledged or proved, and lodged with the clerk of the chancery court of the proper county for record; but they are valid and binding as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consideration.<sup>6</sup> Every conveyance, except deeds of trust and

<sup>1</sup> Howell's Annotated Stats., vol. 2, § 5686.

<sup>2</sup> Howell's Annotated Stats., vol. 2, § 5692. See *Doyle v. Stevens*, 4 Mich. 87; *Barrows v. Baughman*, 9 Mich. 213; *Godroy v. Disbrow*, 11 Mich. 260; *Warner v. Whittaker*, 6 Mich. 133; 72 Am. Dec. 65; *Wilcox v. Hill*, 11 Mich. 256, 263; *Rood v. Chapin*, Walk. Ch. 79.

<sup>3</sup> Stats. 1878, p. 537, § 21.

<sup>4</sup> Stats. 1878, § 26.

<sup>5</sup> Stats. 1878, § 33. See *Smith v. Gibson*, 15 Minn. 89, 99; *Coy v. Coy*, 15 Minn. 119, 126.

<sup>6</sup> Rev. Code, 1871, p. 503, § 2304.

mortgages which are properly acknowledged and delivered to the clerk of the proper county, to be recorded within three months after its execution, takes effect from the date of its delivery; but deeds of trust and mortgages, whenever they shall be delivered for record, and deeds not acknowledged and delivered for record within three months after execution, take effect as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors only from the time when delivered to the clerk to be recorded. A deed which is admitted to record without proper acknowledgment does not furnish notice to subsequent purchasers for a valuable consideration.<sup>1</sup>

§ 601. **Missouri.**—Every deed which is duly acknowledged and recorded, imparts notice from the time of filing the same for record to all persons of its contents, and all subsequent purchasers and mortgagees are deemed in law and in equity to purchase with notice.<sup>2</sup> No deed is valid except between the parties and those who have actual notice, until it is deposited with the recorder for record.<sup>3</sup> A power of attorney when recorded can be revoked only by an instrument in writing duly recorded.<sup>4</sup> If a deed is recorded before a sale on execution, it is good as against a judgment, although not recorded until after the judgment was rendered.<sup>5</sup>

§ 602. **Montana.**—Instruments entitled to be recorded must be recorded by the county clerk of the county in which the real property affected thereby is situated. An instrument is deemed recorded when, being duly acknowl-

<sup>1</sup> Rev. Code, 1871, §§ 2306, 2308. See Rev. Code, 1880, §§ 1209, 1212.

<sup>2</sup> Rev. Stats. 1879, vol. 1, p. 114, § 692; Wagner's Stats, 1872, vol. 1, p. 277, § 25.

<sup>3</sup> Rev. Stats. 1879, vol. 1, p. 114, § 693; Wagner's Stats. 1872, vol. 1, p. 277, § 26.

<sup>4</sup> Rev. Stats. 1879, vol. 1, p. 114, § 695; Wagner's Stats. 1872, vol. 1, p. 277, § 28.

<sup>5</sup> *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105; *Valentine v. Havener*, 20 Mo. 133.

edged, or proved and certified, it is deposited in the county clerk's office with the proper officer for record. Grants absolute in terms are to be recorded in one set of books, and mortgages and securities in the nature of mortgages, in another.<sup>1</sup> The acknowledgment of a married woman to an instrument purporting to be executed by her must be taken the same as that of any other person.<sup>2</sup> A conveyance by a married woman has the same effect as if she were unmarried.<sup>3</sup> Officers taking and certifying acknowledgments, or proof of instruments for record must authenticate their certificates by affixing their signatures followed by the names of their offices; also, their seal of office, if by the laws of the State or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals.<sup>4</sup> Every conveyance of real property entitled to record, from the time it is filed with the county clerk for record, is constructive notice of its contents to subsequent purchasers and mortgagees.<sup>5</sup> Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded. The term "conveyance," embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to real property may be affected, except wills. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or

<sup>1</sup> Civil Code, 1895; § 1590-1592.

<sup>2</sup> Civil Code, 1895; § 1606.

<sup>3</sup> Civil Code, 1895; § 1607.

<sup>4</sup> Civil Code, 1895; § 1613.

<sup>5</sup> Civil Code, 1895; § 1640.



proved, certified, and recorded in the same office in which the instrument containing the power was recorded.<sup>1</sup> An unrecorded instrument is valid as between the parties and those who have notice of it.<sup>2</sup>

§ 603. Nebraska.—Every deed is considered recorded from the time of delivery to the clerk, and takes effect from such time, and not before, as to all creditors and subsequent purchasers, in good faith without notice, and is adjudged void as to all such creditors and subsequent purchasers without notice, whose conveyances are first recorded, provided that these conveyances are valid between the parties.<sup>3</sup> A deed is not considered lawfully recorded unless previously it has been duly acknowledged or proved.<sup>4</sup> It is no objection to the record of a deed that no official seal is appended to the recorded acknowledgment of it, “if, when the acknowledgment or proof purports to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment or proof that the same is made under his hand and seal of office, and such statement shall be presumptive evidence that the affixed seal was attached to the original instrument.”<sup>5</sup> The copy of a record or of a recorded deed authenticated in such manner as to entitle it to be read in evidence, may, when the loss of the original deed and of the record is proved, be again recorded, and such record has the same effect as the original.<sup>6</sup> An unrecorded mortgage is entitled to priority over a subsequent conveyance made by the mortgagor without consideration.<sup>7</sup> Where, through mistake, there is an omission of a part

<sup>1</sup> Civil Code, 1895; § 1643.

<sup>2</sup> Civil Code, 1895; § 1644.

<sup>3</sup> Comp. Stats. 1881 (Brown), p. 389, §§ 15, 16; Comp. Stats. 1885, p. 477, § 16.

<sup>4</sup> Comp. Stats. 1881 (Brown), p. 390, § 17; Comp. Stats. 1885, p. 478, § 17. See Comp. Stats. 1885, c. 18, § 82; c. 73, §§ 15–18, Laws of 1887, c. 30.

<sup>5</sup> Comp. Stats. 1881 (Brown), p. 390, § 20; 1885, p. 478, § 20.

<sup>6</sup> Comp. Stats. 1881 (Brown), § 21; Comp. Stats. 1885, p. 477, § 21.

<sup>7</sup> *Merriman v. Hyde*, 9 Neb. 120.

of the lands in the record described in a mortgage, and a judgment is recovered subsequently against the mortgagor, the lien of the judgment creditor must be postponed to the equity of the mortgagee.<sup>1</sup> By a law enacted in 1887, registers of deeds are elected in all counties having a population of eighteen thousand and over, who have all the powers and perform all the duties formerly performed by county clerks.<sup>2</sup>

**§ 604. Nevada.**—Conveyances to operate as notice to third persons must be recorded in the office of the recorder of the county where the land is situated, but are valid and binding between the parties without registration. A conveyance, from the time it is filed with the recorder for record, imparts notice to all persons of its contents, and subsequent purchasers and mortgagees are deemed to purchase with notice.<sup>3</sup> Every conveyance which is not thus recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded.<sup>4</sup> A power of attorney when once recorded can be revoked only by an instrument of revocation duly recorded.<sup>5</sup> By filing such a revocation for record, it becomes absolute without actual notice to the attorney. It operates as notice to all persons dealing with him.<sup>6</sup>

**§ 605. New Hampshire.**—No deed of real estate is valid to hold the same against any person but the grantor and

<sup>1</sup> *Galway v. Malchow*, 7 Neb. 289, overruling *Bennett v. Fooks*, 1 Neb. 465. See, generally, *Mansfield v. Gregory*, 8 Neb. 435; *Berkley v. Lamb*, 8 Neb. 392; *Harral v. Gray*, 10 Neb. 189; *Edminster v. Higgins*, 6 Neb. 269; *Metz v. State Bank etc.*, 7 Neb. 171; *Jones v. Johnson Harvester Co.*, 8 Neb. 451; *Lincoln etc. Assn. v. Haas*, 10 Neb. 583; *Hooker v. Hammill*, 7 Neb. 234; *Colt v. Du Bois*, 7 Neb. 394; *Dorsey v. Hall*, 7 Neb. 465.

<sup>2</sup> Laws, 1887, p. 362.

<sup>3</sup> Comp. Laws, 1873, vol. 1, p. 82, §§ 252, 253. See *Crosier v. McLaughlin*, 1 Nev. 348; *Virgin v. Brubaker*, 4 Nev. 81; *Grellett v. Heilshorn*, 4 Nev. 526.

<sup>4</sup> Comp. Laws, 1873, vol. 1, § 254.

<sup>5</sup> Comp. Laws, 1873, vol. 1, § 256.

<sup>6</sup> *Arnold v. Stevenson*, 2 Nev. 234.

his heirs only, unless attested, acknowledged, and recorded as provided by statute.<sup>1</sup> "Any deed not acknowledged by the grantor, but in other respects duly executed, may be recorded, and for sixty days after such recording shall be as effectual as if duly acknowledged."<sup>2</sup> If a person who has a deed neglects or refuses to allow it to be recorded for the space of thirty days, after being requested to do so in writing by any person having an interest in the estate, any justice upon complaint may issue his warrant and cause such person to be brought before him for examination; and if sufficient cause for this neglect or refusal is not shown, the justice may order such deed to be recorded, and may commit the holder to jail until the order is performed.<sup>3</sup>

§ 606. New Jersey.—A deed is void and of no effect against a subsequent judgment creditor or *bona fide* purchaser or mortgagee for a valuable consideration without notice, unless the deed is recorded, or filed for record with the clerk of the court of common pleas of the county containing the land, within fifteen days after the time the deed is signed, sealed, and delivered; but the deed is nevertheless valid and operative between the parties and their heirs.<sup>4</sup> Where, by reason of a failure to record a deed within fifteen days after its delivery, title to the property is acquired by a third party, the documentary evidence will entitle such party to recover the premises, unless the party claiming under the first deed can show that the other had notice of it. The burden of proof rests upon the party who claims under the first deed.<sup>5</sup> Where there are two deeds, if the one which was given is recorded

<sup>1</sup> Gen. Laws, 1878, p. 323, c. 135, § 4.

<sup>2</sup> Gen. Laws, 1878, § 7.

<sup>3</sup> Gen. Laws, 1878, § 11.

<sup>4</sup> Revision of 1877, p. 155, § 14; Law of 1887, ch. 164.

<sup>5</sup> *Coleman v. Barklew*, 3 Dutch. 357; *Lewis v. Hall*, 3 Halst. Ch. 107; *Freeman v. Elmendorf*, 3 Halst. Ch. 475; *Vreeland v. Claflin*, 9 Green, C. E. 313; *Blair v. Ward*, 2 Stockt. Ch. 119; *Holmes v. Stout*, 2 Stockt. Ch. 419; *Sanborn v. Adair*, 29 N. J. Eq. 368.

within fifteen days after its delivery, it will have priority over the second, although the second was recorded first.<sup>1</sup> A deed which is not recorded is valid as against an attaching creditor having notice thereof before judgment.<sup>2</sup>

§ 607. **New Mexico Territory.**—Deeds are recorded in the office of the archives of the county where the real estate is situated. After registration a deed gives notice of the time of its being registered to all persons mentioned in it, and all purchasers and mortgagees are considered as having purchased under such notice. A deed is not valid except as to the parties interested, and those who have actual notice, until it is deposited in the office of the clerk to be registered.<sup>3</sup> A power of attorney which has been recorded can be revoked only by a revocation duly recorded.<sup>4</sup>

§ 608. **New York.**—Deeds are conclusive as against subsequent purchasers from the grantor or from his heirs claiming as such, except against subsequent purchasers in good faith, and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first duly recorded.<sup>5</sup> Different sets of books are provided for the recording of deeds and mortgages; in one of these, all conveyances absolute in their terms, and not intended as mortgages or as securities in the nature of mortgages, are to be recorded, and in the other set such mortgages and securities shall be recorded. A deed, which by any other instrument in writing shall be in-

<sup>1</sup> *Den v. Rechman*, 1 Green (13 N. J. L.), 43.

<sup>2</sup> *Garwood v. Garwood*, 4 Halst. 193. See, also, *Diehl v. Page*, 2 Green, Ch. 143; *Cornelius v. Giberson*, 1 Dutch. 1; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Lee v. Woodworth*, 2 Green Ch. 37; *Hoy v. Bramhall*, 19 N. J. Eq. 564; 97 Am. Dec. 687; *Nichols v. Peak*, 1 Beasl. 70; *Wells v. Wright*, 7 Halst. 131; *Van Doren v. Robinson*, 1 Green, C. E. 256; *Mellon v. Mulvey*, 8 Green, C. E. 198; *Annin v. Annin*, 9 Green, C. E. 185.

<sup>3</sup> Gen. Laws, 1880, p. 236, c. 44, §§ 14-16. Laws of 1887, c. 10.

<sup>4</sup> Gen. Laws, 1880, § 19.

<sup>5</sup> Rev. Stats., vol. 2, p. 1119, § 165; Rev. Stats., vol. 2, p. 1138, § 1; Fay's Dig. of Laws, 1876, vol. 1, p. 580.

tended only as a mortgage, though it may be an absolute conveyance in form, shall be treated as a mortgage; and the person for whose benefit the deed is made will not derive any advantage from its registration, unless every writing operating as a defeasance or explanatory of its character as a mortgage is also recorded with the deed and at the same time.<sup>4</sup> A copy of a record, or of a recorded deed, attested in such manner as would entitle it to be read in evidence, may, if the loss of the original and the record be proven, be again recorded, and such record shall have the same effect as the original record.<sup>1</sup>

**§ 609. North Carolina.**—A deed is not good and available in law unless it is acknowledged and proved in the manner required by law, and registered in the county where the land lies within two years after the date of the deed. All deeds thus executed and registered are valid without livery of seisin or other ceremony.<sup>2</sup> Deeds of gift must also be registered within two years after execution, else they are void.<sup>3</sup> A deed of trust or mortgage

<sup>1</sup> Rev. Stats., vol. 2, p. 1138, §§ 2, 3.

<sup>2</sup> Rev. Stats., vol. 2, p. 1148, § 51; Fay's Dig., vol. 1, p. 586, § 50; 3 Rev. Stats., 7th ed., pp. 2215, 2216. See, generally, *Newton v. McLean*, 41 Barb. 285; *Fort v. Burch*, 6 Barb. 60; *Schutt v. Large*, 6 Barb. 373; *Truscott v. King*, 6 Barb. 346; *Westbrook v. Gleason*, 79 N. Y. 23; *Lacustrine etc. Co. v. Lake Guano etc. Co.*, 82 N. Y. 476; *Hoyt v. Thompson*, 5 N. Y. 347; *Judson v. Dada*, 79 N. Y. 373; *Page v. Waring*, 76 N. Y. 463.

<sup>3</sup> Code, vol. 1, p. 490, § 1245; Code, §§ 1252, 1254. See *Morris v. Ford*, 2 Dev. Eq. 412; *Walker v. Coltraine*, 6 Ired. Eq. 79; *Doak v. State Bank*, 6 Ired. 309; *Osborne v. Ballew*, 7 Ired. 415; *Williams v. Griffin*, 4 Jones, 31; *Walston v. Brasswell*, 1 Jones Eq. 137; *Freeman v. Hatley*, 3 Jones, 115; *Johnson v. Pendergrass*, 4 Jones, 479; *Latham v. Bowen*, 7 Jones, 337; *Hare v. Jernigan*, 76 N. C. 471; *King v. Portis*, 81 N. C. 382; *McMillan v. Edwards*, 75 N. C. 81; *Salms v. Martin*, 63 N. C. 608; *Linker v. Long*, 64 N. C. 296; *Hogan v. Strayhorn*, 65 N. C. 279; *Love's Executors v. Habbin*, 87 N. C. 249; *Ivey v. Granberry*, 66 N. C. 223; *Triplett v. Witherspoon*, 74 N. C. 475; *Riggan v. Green*, 80 N. C. 286; 30 Am. Rep. 77; *Henley v. Wilson*, 81 N. C. 405; *Davis v. Inscœ*, 84 N. C. 396; *Mosely v. Mosely*, 87 N. C. 69; *Isler v. Foy*, 66 N. C. 547; *Paul v. Carpenter*, 70 N. C. 502; *Wilson v. Sparks*, 72 N. C. 208; *Starke v. Etheridge*, 71 N. C. 240; *Holmes v. Marshall*, 72 N. C. 87; *Buie v. Carver*, 75 N. C. 559; *McCall v. Wilson*, 101 N. C. 598.

<sup>4</sup> Code, vol. 1, p. 490, § 1252.

is not valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor or mortgagor, but from the time of registration of such deed of trust or mortgage in the county in which the land is situated.<sup>1</sup> An error in the registration of an instrument may be corrected by the clerk of the superior court, upon petition.<sup>2</sup>

**§ 609 a. North Dakota.**—Any instrument or judgment affecting the title to or possession of real property may be recorded, and when entitled to record must be recorded by the register of deeds of the county in which the real property affected thereby is situated. The register is required in all cases to indorse the amount of his fee for the recording on the instruments recorded.<sup>3</sup> An instrument is considered recorded when properly acknowledged, or proved and certified, it is deposited in the register's office with the proper officer for record.<sup>4</sup> Grants absolute in terms and mortgages are to be recorded in separate books.<sup>5</sup> A conveyance by a married woman has the same effect as if she was unmarried, and may be acknowledged

<sup>1</sup> Code, vol. 1, § 1254. See *Smith v. Washington*, 1 Dev. Eq. 318; *Skinner v. Cox*, 4 Dev. 59; *Leggett v. Bullock*, Busb. 283; *Moore v. Collins*, 4 Dev. 384; *Dewey v. Littlejohn*, 2 Ired. Eq. 495; *McKinnon v. McLean*, 2 Dev. & B. 79; *Metts v. Bright*, 4 Dev. & B. 173; 32 Am. Dec. 683; *Norwood v. Marrow*, 4 Dev. & B. 442; *Barnett v. Barnett*, 1 Jones Eq. 221; *Simpson v. Morris*, 3 Jones, 411; *Barrett v. Cole*, 4 Jones, 40; *Green v. Kornegay*, 4 Jones, 66; 67 Am. Dec. 261; *Dukes v. Jones*, 6 Jones, 14; *Newell v. Taylor*, 3 Jones Eq. 374; *Saunders v. Ferrell*, 1 Ired. 97; *Halcombe v. Ray*, 1 Ired. 340; *Doak v. State Bank*, 6 Ired. 309; *Johnson v. Malcolm*, 6 Jones Eq. 120; *Moring v. Dickerson*, 85 N. C. 466; *Parker v. Scott*, 64 N. C. 118; *McCoy v. Wood*, 70 N. C. 125; *Robinson v. Willoughby*, 70 N. C. 358; *Blevins v. Barker*, 75 N. C. 436; *Edwards v. Thompson*, 71 N. C. 177; *Moore v. Ragland*, 74 N. C. 343; *Starke v. Etheridge*, 71 N. C. 340; *Harris v. Jones*, 83 N. C. 317; *King v. Portis*, 77 N. C. 25; *Todd v. Outlaw*, 79 N. C. 235; *Capehart v. Biggs*, 77 N. C. 261; *Purnell v. Vaughan*, 77 N. C. 268; *Beaman v. Simmons*, 76 N. C. 43.

<sup>2</sup> Code, vol. 1, § 1266. See *Jones v. Physioc*, 1 Dev. & B. 173; *Oldham v. Bank*, 85 N. C. 240.

<sup>3</sup> Rev. Code 1895, §§ 3563-3567.

<sup>4</sup> Rev. Code 1895, § 3568.

<sup>5</sup> Rev. Code 1895, § 3570.

in the same manner.<sup>1</sup> Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing to them their signatures, followed by the names of their offices; also, their seals of office, if by the laws of the territory, State or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals. Judges and clerks must authenticate their certificates by affixing to them the seal of the proper court, and mayors of cities by the seal thereof.<sup>2</sup> Every conveyance of real property other than a lease for a term not exceeding one year, is void as against subsequent purchasers or encumbrancers, including an assignee of a mortgage, lease, or other conditional sale of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.<sup>3</sup> The term "conveyance," as used in the code, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected except wills, statutory contracts for the sale or purchase of real property and powers of attorney.<sup>4</sup> No instrument conferring a power to convey or execute instruments affecting real property which has been recorded is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded.<sup>5</sup>

§ 610. Ohio.—Powers of attorney must be recorded in the office of the recorder of the county where the land lies, prior to the execution of the deed made in pursuance

<sup>1</sup> Rev. Code 1895, § 3578.

<sup>2</sup> Rev. Code 1895, § 3586.

<sup>3</sup> Rev. Code 1895, § 3594.

<sup>4</sup> Rev. Code 1895, § 3595.

<sup>5</sup> Rev. Code 1895, § 3596.



of it.<sup>1</sup> A deed must be recorded within six months from its date. If not so recorded, it is deemed fraudulent, so far as relates to any subsequent *bona fide* purchaser, having at the time of purchase no knowledge of the existence of the deed. The deed may, however, be recorded after the expiration of this time, and from the date of such record shall be notice to any subsequent purchaser.<sup>2</sup>

§ 611. **Oregon.**—A deed is considered as recorded at the time it is received by the recorder for record.<sup>3</sup> Every deed which is not recorded within five days after its execution is void against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded.<sup>4</sup> A deed absolute in terms, defeasible by a deed of defeasance, is not affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the defeasance is recorded in the office of the recorder of the county where the land lies.<sup>5</sup>

§ 611 a. **Oklahoma Territory.**—Every conveyance of real property, other than a lease not exceeding one year, is void as against subsequent purchasers and encumbrancers, including an assignee of a mortgage, lease, or other conditional sale of the property, or any part thereof, who becomes such in good faith and for a valuable consideration, and whose conveyance is first duly recorded.

<sup>1</sup> Rev. Stats. 1880, vol. 1, p. 1033, § 4132. Laws of 1885, p. 230.

<sup>2</sup> Rev. Stats. 1880, vol. 1, p. 1034, § 4134. See *Doe v. Bank of Cleveland*, 3 McLean, 140; *Lessee of Cunningham v. Buckingham*, 1 Ohio, 265; *Lessee of Allen v. Parish*, 3 Ohio, 107; *Smith v. Smith*, 13 Ohio St. 532; *Northrup's Lessee v. Brehmer*, 8 Ohio, 392; *Leiby's Executors v. Wolf*, 10 Ohio, 83; *Stansell v. Roberts*, 13 Ohio, 148; 42 Am. Dec. 193; *Mayham v. Coombs*, 14 Ohio, 428; *Lessee of Irvin v. Smith*, 17 Ohio, 226; *Price v. Methodist Episcopal Church*, 4 Ohio, 515; *Spader v. Lawler*, 17 Ohio, 371; 49 Am. Dec. 461; *Bloom v. Noggle*, 4 Ohio St. 45; *Bercaw v. Cockerill*, 20 Ohio St. 163.

<sup>3</sup> Gen. Laws, p. 518, § 24. But the time during which deeds were allowed to be filed was changed in 1885.

<sup>4</sup> Gen. Laws, § 26.

<sup>5</sup> Gen. Laws, § 28. Annotated Laws, 1887, §§ 3024–3029.

Dower and curtesy are abolished. Conveyances must be recorded with the register of deeds of the county in which the land affected thereby is situated.

§ 612. **Pennsylvania.**—Deeds executed within the State should be recorded in the office for recording deeds in the county in which the land is situated within six months after execution; and if not so recorded they will be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless recorded before the proving and recording of the deed or conveyance under which the subsequent purchaser or mortgagee claims.<sup>1</sup> If executed without the State, they must be so recorded within twelve months after their execution.<sup>2</sup>

§ 613. **Rhode Island.**—Deeds, mortgages, and deeds of trust are void, unless they are duly acknowledged and recorded; but, between the parties and their heirs, they are nevertheless valid and binding.<sup>3</sup> They are recorded

<sup>1</sup> Purdon's Dig. (Brightley), p. 321, § 71. See as to statute relating to Philadelphia only, Purdon's Ann. Dig., p. 2110, § 5.

<sup>2</sup> Purdon's Dig. (Brightley), § 72. See on the question of notice, *Chew v. Barnett*, 11 Serg. & R. 389; *Harris v. Bell*, 10 Serg. & R. 39; *Krider v. Lafferty*, 1 Whart. 303; *Randall v. Silverthorn*, 4 Barr. 173; *Hetherington v. Clark*, 6 Casey, 393; *Boggs v. Varner*, 6 Watts & S. 469; *Miller v. Oresson*, 1 Watts & S. 284; *Green v. Drinker*, 7 Watts & S. 440; *Parke v. Chadwick*, 8 Watts & S. 96; *Kerns v. Swope*, 2 Watts, 75; *Epley v. Witherow*, 7 Watts, 167; *Lewis v. Bradford*, 10 Watts, 67; *Rankin v. Porter*, 7 Watts, 387. As to the parties bound by an unrecorded conveyance, see *Nice's Appeal*, 54 Pa. St. 200; *Adams' Appeal*, 1 Pen. & W. 447; *Speer v. Evans*, 47 Pa. St. 141; *Mellon's Appeal*, 32 Pa. St. 121; *Britton's Appeal*, 45 Pa. St. 172. *Bona fide* purchasers: *Hoffman v. Strohecker*, 7 Watts, 90; 32 Am. Dec. 740; *Poth v. Anstatt*, 4 Watts & S. 307; *Bracken v. Miller*, 4 Watts & S. 102; *Union Canal Co. v. Young*, 1 Whart. 410, 432; 30 Am. Dec. 212; *Sailor v. Hertzog*, 4 Whart. 264; *Jacques v. Weeks*, 7 Watts, 261; *Snider v. Snider*, 3 Phila. 160; *Plummer v. Robertson*, 6 Serg. & R. 179. On the question of priority, see *Brooke's Appeal*, 64 Pa. St. 127; *Lightner v. Mooney*, 10 Watts, 407; *Bratton's Appeal*, 8 Pa. St. 164; *Foster's Appeal*, 3 Pa. St. 79; *Ebner v. Goundie*, 5 Watts & S. 49; *Safe Deposit & Trust Co. v. Kelly*, 159 Pa. St. 82; *Fries v. Null*, 154 Pa. St. 573.

<sup>3</sup> Public Stats. 1882, p. 443, c. 173, § 4; Gen. Stats. 1872, p. 350, § 4. See *Harris v. Arnold*, 1 R. I. 125; *Thurber v. Dwyer*, 10 R. I. 355.

in the office of the town clerk of the town where the land lies.

§ 614. **South Carolina.**—Conveyances, if made within the State, must be recorded within six months from their execution; if by a resident of any other State, within twelve months; and if made without the limits of the United States, then within two years. If not recorded within these periods, respectively, they are valid and legal only as to the parties themselves and their heirs, but are void and incapable of defeating the right of persons claiming as creditors, or under subsequent purchases recorded in the manner prescribed by statute.<sup>1</sup> A mortgage is not valid so as to affect the rights of subsequent creditors or purchasers for a valuable consideration without notice, unless it is recorded within sixty days from its execution.<sup>2</sup> The conveyance (except original grants) first registered is deemed to be the first conveyance, notwithstanding the execution of any conveyance not before registered.<sup>3</sup>

§ 614 a. **South Dakota.**—All instruments affecting the title to real property must be recorded with the register of deeds of the county in which the property lies, and every such conveyance other than a lease for a term of years is void as against a subsequent purchaser or encumbrancer in good faith and for a valuable consideration whose conveyance is first recorded. The registry laws include assignments of mortgages, leases, and conditional sale.<sup>4</sup> It is not necessary to the validity of a deed that it should be sealed or have attesting witnesses.<sup>5</sup>

<sup>1</sup> Rev. Stats. 1873, p. 422, § 1. A. A. 1876; 16 Stat. 92.

<sup>2</sup> Rev. Stats. 1873, § 2. But see change by Rev. Stats. 1893, § 1776.

<sup>3</sup> Rev. Stats. 1873, p. 424, § 6. A. A. 1876; 16 Stat. 92. See *Williams v. Beard*, 1 S. C. 309; *McFall v. Sherrard*, Harp. 295; *Massey v. Thompson*, 2 Nott & McC. 105; *Steele v. Mansell*, 6 Rich. 437; *Tart v. Crawford*, 1 McCord, 265; *Dawson v. Dawson*, Rice Eq. 243; *Boyce v. Shiver*, 3 S. C. 515; *Stokes v. Hodges*, 11 Rich. Eq. 135.

<sup>4</sup> C. C. §§ 651, 671; C. L. 3272, 3293.

<sup>5</sup> C. C. § 622; C. L. § 3245.

§ 615. **Tennessee**—Deeds are registered in the county where the land lies, unless it lies partly in two or more counties, and then it may be registered in either. If the deed embraces several tracts of land lying in different counties, it shall be registered in each of the counties where any of the tracts lie. A deed is not good and available in law as to strangers, unless it is acknowledged and registered by the register of the county where the land lies. Deeds have effect between the parties and their heirs and representatives without registration; but as to other persons who have not actual notice, only from the time they are noted for registration, on the register-books of the register, unless otherwise expressly provided.<sup>1</sup> When so registered, they are notice to all the world from the time at which they are noted for registration. The deed first registered or noted for registration has preference over one of earlier date, but noted for registration subsequently, unless in a court of equity it is proven that the party claiming under the subsequent deed had full notice of the earlier one.<sup>2</sup> Conveyances not so acknowledged and registered, or noted for registration, are null and void as against existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice.<sup>3</sup>

§ 616. **Texas**.—Deeds are void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and filed with the recording officer, to be recorded as required by law; but they are valid as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consideration.<sup>4</sup> Deeds take effect as to all sub-

<sup>1</sup> Stats. 1871 (Thompson & Steger), § 2072.

<sup>2</sup> Notice to a trustee is notice to the principal: *Myers v. Ross*, 3 Head, 59.

<sup>3</sup> Stats. 1871 (Thompson v. Steger), §§ 2005, 2032, 2072, 2073, 2075; Code M. & V. 2887, 2888. See *Thomas v. Blackemore*, 5 Yerg. 113, 124; *May v. McKeenon*, 6 Humph. 209; *Vance v. McNairy*, 3 Yerg. 176; 24 Am. Dec. 553; *Shields v. Mitchell*, 10 Yerg. 8; *Hays v. McGuire*, 8 Yerg. 92.

<sup>4</sup> Rev. Stats. 1879, p. 625, § 4332; Paschal's Dig., vol. 1, p. 836, § 4988.

sequent purchasers, for a valuable consideration, without notice, and as to all creditors, from the time when they are delivered to the clerk for record, and from that time only.<sup>1</sup>

§ 617. **Utah.**—Deeds must be attested by one credible witness and acknowledged before they are entitled to record. They are valid as against the parties and those who have actual notice without registration, but to impart notice to third persons must be recorded. Deeds not recorded are void against subsequent purchasers in good faith and for a valuable consideration, when such subsequent purchasers have their deeds first duly recorded. Notice of the contents of a deed is given to every person from the time it is filed for record. A power of attorney, when recorded, can be effectually revoked only by having the revocation also recorded.<sup>2</sup>

§ 618. **Vermont.**—Deeds must be attested by two or more witnesses, and are recorded in the clerk's office of the town where the lands lie. If there is no town clerk they are recorded by the clerk of the county.<sup>3</sup> A deed is not effectual in law to hold the land conveyed against any person but the grantor and his heirs, unless it is acknowledged and recorded as provided by statute.<sup>4</sup> A deed made under a power of attorney has no effect, and is not admissible in evidence, unless such power of attorney is signed, sealed, attested, and acknowledged and recorded in the office where the deed is required to be recorded.<sup>5</sup>

<sup>1</sup> Rev. Stats. 1879, p. 626, § 4334.

<sup>2</sup> Laws, 1853, c. 75. See Laws, 1867, c. 28.

<sup>3</sup> Rev. Laws, 1880, pp. 338, 339, §§ 1927, 1929.

<sup>4</sup> Rev. Laws, 1880, p. 339, § 1931. See *Ludlow v. Gill*, Chip. N. 63; *Morris v. Ludlow*, 1 Chip. D. 49; *Barney v. Currier*, 1 Chip. D. 315; 6 Am. Dec. 739; *Stewart v. Thompson*, 3 Vt. 255; *Brackett v. Wait*, 6 Vt. 411; *Harrington v. Gage*, 6 Vt. 532; *Corliss v. Corliss*, 8 Vt. 373; *Pratt v. Bank of Bennington*, 10 Vt. 293; 33 Am. Dec. 201; *Barnard v. Whipple*, 29 Vt. 401; 70 Am. Dec. 422; *Sterling v. Baldwin*, 42 Vt. 306; *Sprague v. Rockwell*, 51 Vt. 401.

<sup>5</sup> Rev. Laws, 1880, § 1935. See *Oatman v. Fowler*, 43 Vt. 462.

§ 619. **Virginia.**—Deeds of trust and mortgages are not effectual against creditors and subsequent purchasers for a valuable consideration without notice, except from the time at which they are duly admitted to record.<sup>1</sup> Every contract relating to real estate shall, from the time it is duly admitted to record, be as valid against creditors and purchasers as if the contract were a deed conveying the estate.<sup>2</sup>

§ 620. **Washington.**—Conveyances are valid as against *bona fide* purchasers from the time they are filed for record, and when so filed the record is filed to give notice to all the world.<sup>3</sup> When a deed is made by a commissioner appointed by the court the conveyance shall be recorded in the office in which by law it should have been if made by the parties whose title is conveyed by it.<sup>4</sup>

§ 621. **West Virginia.**—Deeds are void as to creditors and subsequent purchasers for a valuable consideration without notice until they are duly admitted to record in the county where the property embraced in the deed is situated. Where two or more instruments affecting the same property are admitted to record in the same county on the same day, the one first admitted to record has priority as to the property situated in such county. By the terms “creditors” and “purchasers” are embraced not only those from the grantor, but also those who, but for the deed or other conveyance, would have title to the property conveyed, or a right to subject it to the payment of their debts.<sup>5</sup>

§ 622. **Wisconsin.**—Every conveyance which is not recorded as provided by law is void as against subsequent

<sup>1</sup> Code, 1873, c. 114, §§ 4-9; Code, §§ 2463, 2464, 2467. See *Beverly v. Ellis*, 1 Rand. 102; *Beck's Administrators v. De Baptists*, 4 Leigh, 349; *Bird v. Wilkinson*, 4 Leigh, 266; *Lane v. Mason*, 5 Leigh, 520; *Glazebrook's Administrators v. Ragland's Administrators*, 8 Gratt. 344; *McClure v. Thistle's Executors*, 2 Gratt. 182.

<sup>2</sup> Code, 1887, § 2464.

<sup>3</sup> Laws of 1877, p. 312; 1 S. & C., § 1439.

<sup>4</sup> Code of Washington, 1896, § 4981.

<sup>5</sup> Code, 1887, c. 74, §§ b, 8, 9.

purchasers in good faith and for a valuable consideration, whose conveyances shall be first duly recorded.<sup>1</sup> A deed absolute in form is not defeated by a deed of defeasance as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the defeasance is recorded in the office of the register of deeds of the county where the lands are.<sup>2</sup> A power of attorney, when recorded, can be revoked effectually only by recording the instrument of revocation.<sup>3</sup> A deed executed in 1868 passes the legal title to land in Wisconsin, though not acknowledged or attested, as those formalities are only essential to entitle it to record.<sup>4</sup>

**§ 623. Wyoming.**—Conveyances under seal attested by two or more witnesses, and properly acknowledged, are recorded in the office of the register of deeds of the county in which the land is situated, within three months from the date of the instrument. All conveyances so recorded are notice to any subsequent purchaser, from the time the instrument is delivered at the office of the register of deeds for registration.<sup>5</sup>

**§ 624. Effect of statutes giving time to record deeds—Valid from delivery.**—Where, by the provisions of the statute, a purchaser is allowed a specified time after the

<sup>1</sup> Rev. Stats., 1878, p. 641, § 2241. See *Evarts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314; *Evarts v. Agnes*, 6 Wis. 453; *Hodson v. Treat*, 7 Wis. 263; *Myrick v. McMillan*, 13 Wis. 188; *Deuster v. McCamus*, 14 Wis. 307; *Stewart v. McSweeney*, 14 Wis. 468; *Straight v. Harris*, 14 Wis. 509; *Gee v. Bolton*, 17 Wis. 604; *Fery v. Pfeiffer*, 18 Wis. 510; *Wyman v. Carter*, 20 Wis. 107; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436; *Shove v. Larsen*, 22 Wis. 142; *Schnee v. Schnee*, 23 Wis. 377; 99 Am. Dec. 183; *Hay v. Hill*, 24 Wis. 235; *Stevens v. Brooks*, 24 Wis. 326; *Wickes v. Lake*, 25 Wis. 71; *The International Life Ins. Co. v. Scales*, 27 Wis. 640; *Smith v. Garden*, 28 Wis. 685; *Fallas v. Pierce*, 30 Wis. 443; *Gilbert v. Jess*, 31 Wis. 110; *Hoyt v. Jones*, 31 Wis. 389; *Ehle v. Brown*, 31 Wis. 405; *Austin v. Holt*, 32 Wis. 478; *Quinlan v. Pierce*, 34 Wis. 304.

<sup>2</sup> Rev. Stats., § 2243.

<sup>3</sup> Rev. Stats., § 2246.

<sup>4</sup> *Leinenkugel v. Kehl*, 73 Wis. 238.

<sup>5</sup> Compiled Laws, 1876, p. 284, c. 40, §§ 1, 3; Rev. Stats., §§ 15–21.



execution of the deed in which to procure its registration, the deed takes effect as it would if such statutes did not exist; that is, from its delivery. It is valid from delivery as against subsequent purchasers. A deed thus recorded within the statutory period will prevail over the deed of a person who purchased the property after the execution of the former deed, but before it was filed for registration.<sup>1</sup> Speaking of the statute of Mississippi, which allows three months after execution for the registration of conveyances, except deeds of trust and mortgages, and provides that if so recorded they shall be valid from delivery, the court say: "The lodging with the clerk of any of the instruments enumerated in the act for record (except deeds of trust and mortgages), within three months after execution, makes such instruments valid from date of delivery, so as to prevail against a purchaser or creditor who has acquired a right subsequent to the date of delivery, although prior to the time of deposit of the instrument with the clerk. In other words, filing the deed with the clerk within three months makes the benefit of registration relate back to the day of delivery, so as to prevail against intermediate conveyances or encumbrancers. Deeds of trust and mortgages, however, have no relation back to any act or date; and notice to subsequent purchasers and creditors begins from the time they are filed with the clerk for record. If the instruments to which three months are allowed for record are not registered within the time, they operate to give notice from the time they are lodged with the clerk."<sup>2</sup>

**§ 625. Protection of grantee.**—These statutes giving a specified time from the execution of a conveyance in which to record it are intended for the benefit of the grantee. He may, by recording his deed within

<sup>1</sup> *Dale v. Arnold*, 2 Bibb, 605; *Claiborne v. Holmes*, 51 Miss. 146. See, also, *Stanzell v. Roberts*, 13 Ohio, 148; 43 Am. Dec. 193; *Mayham v. Coombs*, 14 Ohio, 428.

<sup>2</sup> *Claiborne v. Holmes*, 51 Miss. 146, 150, per Simrall, J.

the stipulated time, have it take effect from its execution. If he neglects to file it for record within this time, it is not void. In a case in Indiana, it was contended that a deed should not go upon the records, unless placed there within the time specified by statute, and that it would not be notice to one who should purchase the property after it was recorded. But the court answered: "This construction we cannot adopt; we think a man could not be considered as standing in the position of a purchaser in good faith, who should buy and take a title in view of a recorded deed of an already outstanding title; but that he would be buying with notice, that is the record would be notice to subsequent purchasers."<sup>1</sup> The Supreme Court of the United States passing on the statute of South Carolina allowing conveyances to be recorded within three months from their date said: "With regard to the position insisted upon in the answers, that the antenuptial settlement was void for the failure to record it within three months from its date in conformity with the law of South Carolina; that position, however maintainable it might be, so far as the instrument was designed to operate by mere legal or constructive effect on creditors and purchasers, becoming such before it was recorded, or in the event of its never being recorded, cannot be supported to the extent that, by the failure to record it within the time prescribed by the statute, the deed would thereby be void to all intents and purposes. Such a deed would, from its execution, be binding at common law *inter partes*, though never recorded; and if, after the expiration of the time prescribed by statute, it should be reacknowledged and then recorded, either upon such reacknowledgment or upon proof of witnesses, it would, from the period of that reacknowledgment and admission to record, be restored to its full effect of notice, which would, by construction, have followed from its being recorded originally within the time prescribed by law."<sup>2</sup>

<sup>1</sup> *Meni v. Rathbone*, 21 Ind. 454. See, also, *De Lane v. Moore*, 14 How. 253; *Belk v. Massey*, 11 Rich. 614; *Irvin v. Smith*, 17 Ohio, 226; *Steele v. Mansell*, 6 Rich. 437; *Mallory v. Stodder*, 6 Ala. 801.

<sup>2</sup> *De Lane v. Moore*, 14 How. 253, 265. The court states that its views

are sustained by numerous decisions, which it cites. In *Steele v. Mansell*, 6 Rich. 437, 454, it is said: "In the confidence which parties repose in each other, hundreds of deeds are never registered, and thousands are not registered within six months. If a deed was registered before the right of a creditor or purchaser arose, of what consequence can it be, that the registration was delayed until the six months had expired? Being without registration good as to the party who made it, the deed might, as to all other persons, be considered as if it had been executed on the day it was registered—in other words, as if it had been re-executed or acknowledged on the day. So if that party should have been dead on the day of registration, the deed good as to his heirs might be considered as if it had been then confirmed by them. Even if infancy, coverture, or other disability should prevent the supposition of confirmation on the day of registration, why should not the deed, binding as to all the world then existing, acquire by such registration such indefeasibility, as thence arises, against that part of the world which afterward sets up opposing rights subsequently acquired? By delaying beyond a prescribed time, the grantee in a deed has lost the right to insist that the tardy registration shall have relation to the date of the deed so as to prevail against intervening claims, but why should he lose the benefit of registration from the day it was made? As regards notice to be obtained by search of a registry, the same search which would disclose a deed registered within a prescribed time, would disclose one registered after the expiration of the time; and the same fraud or disappointment of past expectation, which would arise from a first deed being registered between the search and the execution of a second one, might ensue, whether the registration of the first one was or was not within a prescribed time from its date. If it should be decided that registration after the time does not avail against a subsequent deed executed after this registration and registered in time, a *bona fide* purchaser, whose conveyance was registered after the expiration of six months, say only seven months from its date, and whose grantor had afterward lived many years solvent and honest, might, when these years were past, be deprived of his land, because at last his grantor had fallen into embarrassment, and, under execution against him, the land had been sold. If it should be held that the judgment against the grantor had not preference over the conveyance tardily registered, and that notice to a purchaser at sheriff's sale under the judgment would, as to him, stand in the place of a regular registration, then the right of the fair owner by former purchase to hold his land would depend upon his vigilance in giving actual notice of his conveyance whenever the land was offered for sale by the sheriff, until it might happen that a sale could be made, when notice could not be brought home to a purchaser, who would probably have got a bargain by reason of the very efforts the owner had made to save his rights. Human sagacity could not foretell the extent of disastrous influence which such a decision would have upon the land titles of the State." See, also, *Wood v. Owings*, 1 Oranch, 239.

## CHAPTER XXII.

### REGISTRATION OF DEEDS.

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§ 626. In general.—The design of the registration acts is to afford a convenient means of giving knowledge of the contents of conveyances affecting the title to real property. The title to personal property is transferred by a change of possession. The title to real estate is conveyed by deed. But the owner of the legal title may not be in the possession of the premises, and the record supplies notice to all of his rights. Although a purchaser may have no actual notice of previously recorded deeds, yet he is bound to take notice. The record is open to his inspection, and priority of title is determined, aside from the question of notice to be hereafter considered, by priority of record. The conveyance which is first recorded takes precedence, although it may not have been the deed first executed. Between the original

parties, except in a few States, the force and validity of deeds are not affected by registration. But in contemplation of law, every one has notice of all deeds conveying from one person to another any interest in land, and any rights subsequently acquired must be subordinate to those which the records disclose. It is presumed that the records will show every claim, title, or encumbrance upon every piece of land within the jurisdiction of the recording office. An opportunity is thus given to every intending purchaser to ascertain in whom the legal title lies, and to what encumbrances it is subject, and if he sees fit to rely upon the representations of others without consulting the record, he does so at his own peril. He cannot be considered an innocent purchaser in law, although he may be so in fact, for "the registry laws would be useless, unless subsequent purchasers were bound to take notice of a deed previously recorded."<sup>1</sup>

§ 627. **In England.**—In England there is no general system of registration that prevails throughout the entire kingdom. In certain counties, systems of registration have been provided by different acts of Parliament. By the statute of seventh of Anne, which provides for the registration of conveyances in the county of Middlesex, it is declared that every deed shall be "adjudged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration, unless such memorial be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."<sup>2</sup> At an early day it was determined under the English registry acts that their object was to prevent im-

<sup>1</sup> *Buchanan v. International Bank*, 78 Ill. 500, 503; *Hagar v. Spect*, 52 Cal. 579; *Call v. Hastings*, 3 Cal. 179; *Mesick v. Sunderland*, 6 Cal. 297. And see *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260; *Woodworth v. Guzman*, 1 Cal. 203; *Bird v. Dennison*, 7 Cal. 297.

<sup>2</sup> The different registry acts in England are: West Riding of Yorkshire, 5 Anne, c. 18; East Riding of Yorkshire and Kingston on Hull, 6 Anne, c. 35; North Riding of Yorkshire, 8 George II, c. 6; Middlesex, 7 Anne, c. 20; Irish Act, 6 Anne, c. 2.



position upon subsequent purchasers and mortgagees by setting up prior secret conveyances and fraudulent encumbrances, but that if the purchaser had notice of a prior conveyance, then that was a secret conveyance by which he was not injured, and against which it was not the object of the act to protect him.<sup>1</sup> But by this was meant actual notice. Nothing is said in the statutes about notice, and the rule became established that a subsequent purchaser who has acquired the legal estate was not charged with notice of a prior conveyance from its registry alone.<sup>2</sup> In England, the notice must be so clearly proved as to render the act of taking and registering a conveyance in prejudice to the known title of another an act of fraud. And Sir William Grant regretted that the rule had been even extended that far. "It has been much doubted," said he, "whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance."<sup>3</sup> But the courts in

<sup>1</sup> *Le Neve v. Le Neve*, 1 Amb. 436. Speaking of this doctrine of notice, Lord Eldon in this case says that "the ground of it is plainly this, that the taking of a legal estate after notice of a prior right makes a person *mala fide* purchaser; and not that he is not a purchaser for a valuable consideration in every respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that he takes away the right of another person by getting the legal estate." See, also, *Tunstall v. Trappes*, 3 Sim. 301; *Hines v. Dodd*, 2 Atk. 275; *Oheval v. Nichols*, Strange, 664.

<sup>2</sup> *Wiseman v. Westland*, 1 Younge & J. 117; *Ford v. White*, 16 Beav. 120; *Hodgdon v. Dean*, 2 Sim. & St. 221; *Morecock v. Dickens*, Amb. 678; *Underwood v. Lord Courtown*, 2 Schoales & L. 40; *Bushell v. Bushell*, 1 Schoales & L. 90. In *Ford v. White*, *supra*, the Master of the Rolls, speaking of the effect of the registry acts on the question of notice, said: "Nobody regrets more than I do the effect of the decisions which have qualified the act. The legislature never intended that any notice should nullify it, the object being that all encumbrances should rank according to their priority on the register. The court, however, has held that where a person who has obtained a security has notice of a prior encumbrance, it is inequitable to allow him to obtain a priority over the first encumbrancer by the mere priority of registration. The decisions establish this and they must not be departed from, otherwise many titles would be destroyed."

<sup>3</sup> In *Wyatt v. Barwell*, 19 Ves. 438. And see *Rolland v. Hart*, Law R. 6 App. 678; *Davis v. Earl of Strathmore*, 16 Ves. 419.

that country have held that in certain cases actual notice of a prior registered conveyance may be presumed on the part of a subsequent purchaser, when it is proven that he has made an examination of the proper records.<sup>1</sup>

§ 628. **Registration in the United States.**—In this country, in all of the States, there are statutes which provide for the registration of conveyances affecting the title to real property, after they have been properly acknowledged. An abstract of these was given in the preceding chapter. These statutes have been looked upon with favor by the courts. They embrace equitable estates and interest in land, as well as legal.<sup>2</sup> The record gives notice

<sup>1</sup> *Lane v. Jackson*, 20 Beav. 535; *Hodgson v. Dean*, 2 Sim. & St. 221.

<sup>2</sup> *Parkist v. Alexander*, 1 Johns. Oh. 394; *Alderson v. Ames*, 6 Md. 52; *Doyle v. Teas*, 4 Scam. 202; *Worley v. State*, 7 Lea (Tenn.), 382; *Bellas v. McCarty*, 10 Watts, 13; *Digman v. McCollum*, 47 Mo. 372; *Russell's Appeal*, 3 Harris, 319; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Siter v. McClanachan*, 2 Gratt. 280; *Wilder v. Brooks*, 10 Minn. 50; 88 Am. Dec. 49; *Hunt v. Johnson*, 19 N. Y. 279. In *Bellas v. McCarty*, 10 Watts, 13, 25, Rogers, J., said: "To put equitable titles on a different footing from legal titles would be intolerable in Pennsylvania, where we have no means of compelling the conveyance of the legal title, and where one-third or perhaps one-half of the estates are in the same predicament. And this has been the view taken of the act in the numerous cases which have been cited, to notice which particularly would swell this opinion to an unreasonable extent. The Act of 18th of March, 1775, is not confined to deeds, but directs that every recorder of deeds, etc., shall keep a fair book in which he shall immediately make an entry of every deed or writing brought into his office to be recorded. The language of the act is sufficiently comprehensive to embrace equitable as well as legal titles, and the record of an equitable title is notice to all subsequent purchasers. It is not doubted that a free conveyance duly registered operates to give full effect to the legal and equitable estate conveyed thereby, against a subsequent conveyance of the same legal and equitable estate. Where a person has purchased an equitable title, which he has taken care to put upon the record, in conformity to the directions of the act, it would be difficult to persuade any person that there was any justice in postponing his right in favor of a subsequent purchaser. This, in truth, will not be pretended. And when a purchase has been made of an equitable estate, which has undergone one or more operations by legal conveyances, which have been immediately recorded, why should a second be postponed to a prior purchaser, who has neglected to have his deed recorded, who has neither paid taxes nor taken possession of the property, and who has done no act or thing in

to all the world; and the doctrine of actual notice, not derived from an inspection of the record, as will be more fully treated of in a subsequent part of this treatise, also generally prevails in this country. An exception may, perhaps, be noted in the States of Ohio and North Carolina. In the latter State, by the provisions of the statute, deeds of trust and mortgages have no validity whatever as against purchasers for value and creditors, until they have been registered. They become operative only after they have been registered. It is, therefore, under this statute held in that State, that no notice, however full and formal, will supply the place of registration.<sup>1</sup> In Ohio, the priority of mortgages is fixed by the order in which they are filed for record. The doctrine of notice, so far as these conveyances are concerned, does not prevail.<sup>2</sup> The

assertion of his right, calculated to give notice of his claim? Justice and sound policy would seem to require that in such cases nothing short of clear, positive, and explicit notice should prejudice the right of a second fair and *bona fide* purchaser. But it is said that the defendants have clothed themselves with the legal title, and that where the equities are equal, the maxim is, *qui prior in tempore potior est in jure*. These elementary principles are not denied, but they have no application to the facts of the case. The rule only applies between persons who have been equally innocent and equally diligent. The parties are not in equal equity. One has been vigilant and the other sleepy, and this leaves room for the application of the maxim, *vigilantibus, non dormientibus jura subveniunt*. And when one of two innocent persons must suffer, the loss should be thrown on him whose negligence caused it."

<sup>1</sup> Robinson v. Willoughby, 70 N. C. 358; Leggett v. Bullock, Busb. 283; Fleming v. Burgen, 2 Ired. Eq. 584.

<sup>2</sup> Bercaw v. Ockerill, 20 Ohio St. 163; Stansell v. Roberts, 13 Ohio, 148; 42 Am. Dec. 193. In the former case it is said: "By the Act of March 16, 1838, 'declaratory of the laws upon the subject of mortgages' (S. & C. 469) it is 'declared and enacted that mortgage deeds do and shall take effect and have preference from the time the same are delivered to the recorder of the proper county, to be by him entered upon the record.' Under this statute and that of 1831 on the same subject, it has been uniformly held in a long series of decisions, that a mortgage has no effect, either in law or equity, as against subsequently acquired liens, until its delivery to the recorder of the proper county for record. The result is that mortgages have priority in the order of their respective presentation for record: Magee v. Beatty, 8 Ohio, 396; Stansell v. Roberts, 13 Ohio, 148; 42 Am. Dec. 193; Mayham v. Coombs, 14 Ohio, 428; Holliday v. Franklin Bank of Columbus, 16 Ohio, 533; Woodruff v. Robb, 19 Ohio, 212; White v. Denman, 1 Ohio St. 110; Brown v. Kirkman, 1

notice given by the registry is equivalent to that formerly afforded by livery of seisin.<sup>1</sup>

**§ 629. Registration not necessary between the parties.** It is unnecessary to observe that as between the parties, a deed is perfectly valid without registration, unless there is some statute that imperatively requires recording as one of the essential elements of the execution of the deed. The deed is invalid as against certain persons unless recorded, but "as between the parties to a deed, it has been frequently held the title passes, notwithstanding the deed may not have been recorded, or lodged with the clerk for that purpose."<sup>2</sup> "None of the registering acts have been considered as destroying the conveyance as between the parties to it from the omission to record it. The record was only intended for the benefit of purchasers and creditors."<sup>3</sup> "An unregistered deed is in no case void; it is always good as against the grantor and his heirs."<sup>4</sup> Where the genuineness of the deed

Ohio St. 116; *Foedick v. Barr*, 3 Ohio St. 471; *Bloom v. Noggle*, 4 Ohio St. 45; *Sidle v. Maxwell*, 4 Ohio St. 236; *Tousley v. Tousley*, 5 Ohio St. 78. And in several of these cases it was expressly held that this rule as to priority, is not affected by the fact that the subsequent mortgage is taken with actual notice to the mortgagee of a prior unrecorded mortgage."

<sup>1</sup> See *Bryan v. Bradley*, 16 Conn. 474; *Williamson v. Calton*, 51 Me. 452; *Matthews v. Ward*, 10 Gill & J. 443; *Caldwell v. Fulton*, 31 Pa. St. 483; 72 Am. Dec. 760; *Higbee v. Rice*, 5 Mass. 344; 4 Am. Dec. 63; *Blethen v. Dwinel*, 34 Me. 135; *Wyman v. Brown*, 50 Me. 160.

<sup>2</sup> *McClain v. Gregg*, 2 Marsh. A. K. 454; *Raines v. Walker*, 77 Va. 92; *Ray v. Wilcoxon*, 107 N. C. 514. Where a married woman obtains the legal title to land by a deed from her husband, she must file it for record, or it will not prevail as against subsequent purchasers without notice; *Russell v. Nahl*, 2 Tex. Civ. App. 60.

<sup>3</sup> *Jackson v. West*, 10 Johns. 466.

<sup>4</sup> Chief Justice Kent, in *Jackson v. Burgott*, 10 Johns. 457; 6 Am. Dec. 349; *Fitzhugh v. Croghan*, 2 Marsh. J. J. 429; 19 Am. Dec. 140; *Guerrant v. Anderson*, 4 Rand. 208; *Sicard v. Davis*, 6 Peters, 124; *Phillips v. Green*, 3 Marsh. A. K. 7; 13 Am. Dec. 124; *Smith v. Starkweather*, 5 Day, 207; *Whittemore v. Bean*, 6 N. H. 47; *Rolls v. Graham*, 6 Mon. B. 120; *French v. Gray*, 2 Conn. 92; *Boling v. Ewing*, 9 Dana, 76; *Hancock v. Beverly*, 6 Mon. B. 531; *Wade v. Greenwood*, 2 Rob. (Va.) 474; 40 Am. Dec. 759; *Vose v. Morton*, 4 Cush. 27; 50 Am. Dec.

was admitted, "it proved," said Mr. Justice Marshall of Kentucky, "a transfer of the title from the grantor to the grantee, and was good evidence of this fact, not only between the immediate parties, but against all the world except purchasers for a valuable consideration without notice, and creditors."<sup>1</sup> A deed from State is permitted but not required to be recorded, and is valid against all persons.<sup>2</sup> But if registration is necessary to the validity of the conveyance, as is sometimes required by statute in the case of proceedings in the sale of land for taxes, then recording becomes a condition precedent and no title passes, unless there has been a strict compliance with the statute.<sup>3</sup>

**§ 630. Registration of mortgages in book of deeds.** If the statute requires that separate books shall be kept for the registration of mortgages, subsequent *bona fide* purchasers or mortgagees are not bound by the notice given by the registration of a mortgage recorded in a

750; *Moore v. Thomas*, 1 Or. 201; *Van Huse v. Heames*, 96 Mich. 504; *Snow v. Lake*, 20 Fla. 656; 51 Am. Rep. 625; *Stewart v. Matthews*, 19 Fla. 752; *Christy v. Burch*, 25 Fla. 942; *Warnock v. Harlow*, 96 Cal. 298; 81 Am. St. Rep. 209; *Roane v. Baker*, 120 Ill. 308; *Leaver v. Spink*, 65 Ill. 441; *Shirk v. Thomas*, 121 Ind. 147; 16 Am. St. Rep. 381; *Perdue v. Aldridge*, 19 Ind. 290; *Betts v. Letcher*, 1 S. D. 182; *Ray v. Wilcoxson*, 107 N. C. 514; *Brem v. Lockhart*, 93 N. C. 191; *Stevens v. Morse*, 47 N. H. 532; *Fitzgerald v. Wynne*, 1 D. C. App. 107; *Davis v. Lutkiewicz*, 72 Iowa, 254; *Carleton v. Byington*, 18 Iowa, 482. In *Martin v. Quattlebam*, 3 McCord, 205, it is said: "On the second question, it is not necessary to the validity of a deed that it should be recorded. Recording only becomes necessary in particular when there are double conveyances. If the same grantor convey to two, he whose deed is duly recorded shall hold." See, also, *Phillips v. Hodges*, 109 N. C. 248.

<sup>1</sup> *Boling v. Ewing*, 9 Dana, 76.

<sup>2</sup> *Patterson v. Langston*, 69 Miss. 400.

<sup>3</sup> *Clark v. Tucker*, 6 Vt. 181; *Giddings v. Smith*, 15 Vt. 344; *Morton v. Edwin*, 19 Vt. 81. Under a statute which provides that no estate above seven years shall pass or take effect unless the deed conveying the same shall be executed, acknowledged, and recorded, leasehold estates for ninety-nine years do not pass title so as to relieve the grantor from the payment of rent until the deeds conveying such estate have been recorded: *Nichel v. Brown*, 75 Md. 172.

book of deeds.<sup>1</sup> A conveyed land to B as security for a loan, subject to a mortgage to C, the conveyance being recorded as a deed, and a short time afterward, and after the payment of the loan, B purchased the land from A, and on the latter's securing a satisfaction from C of his mortgage, B paid A the whole price of the land; C had before this time assigned his mortgage to another, D, but the latter had neglected to have his assignment recorded; C received no consideration for executing the release of the mortgage, but B had no notice of this fact, or of the assignment to D. It was held that the lands in the hands of B, and purchasers from him, were discharged from the mortgage, and that although the recording of the deed to B was a nullity in the first instance, yet after he purchased and paid for A's equity in the land, the record of the deed became operative, and the transaction might be considered as equivalent to the delivery of a deed which had been recorded in expectation of a future sale. But it was also held that if the assignment of the mortgage had been recorded while the deed remained as security for A's loan, the land in the hands of B would have been subject to the mortgage thus assigned.<sup>2</sup> But it is held in

<sup>1</sup> *James v. Morey*, 2 Cowen, 246; 14 Am. Dec. 475; 6 Johns. Ch. 417; *Calder v. Chapman*, 52 Pa. St. 359; 91 Am. Dec. 163; *White v. Moore*, 1 Paige, 551; *Clute v. Robison*, 2 Johns. 595; *Warner v. Winslow*, 1 Sand. Ch. 430; *Cordevielle v. Dawson*, 26 La. Ann. 534; *Brown v. Dean*, 3 Wend. 208; *Grimstone v. Carter*, 3 Paige, 421; 24 Am. Dec. 230; *Dey v. Dunham*, 2 Johns. Ch. 182; *McLanahan v. Reeside*, 9 Watts, 508; 36 Am. Dec. 136; *Fisher v. Tunnard*, 25 La. Ann. 179; *Colomer v. Morgan*, 13 La. Ann. 202. The record of a deed in the mortgage record is not constructive notice of the deed to subsequent purchasers: *Drake v. Reggel*, 10 Utah, 376; *Abraham v. Mayer*, 27 N. Y. Supp. 264; 7 Misc. Rep. 250.

<sup>2</sup> *Warner v. Winslow*, 1 Sand. Ch. 430. In *Dey v. Dunham*, 2 Johns. Ch. 182, 189, the Chancellor says: "The deed to the defendant of the fifty lots was on its face an absolute deed in fee, with full covenants, and it was acknowledged and recorded as a deed on the day of its date. It is admitted, however, that the deed was taken in the first instance as a security for the payment of three notes, to the amount of ten thousand dollars, payable in six months, and bearing date about the same time with the deed in January, 1810. Afterward, on the 27th of July, 1810, and about the time that the notes became due, other notes were given in lieu of them, and an agreement under seal executed by the defend-



Nevada that the statute of that State concerning conveyances has no provisions similar to those of the statutes of New York, under which it is held in the latter State, that the record of a deed absolute upon its face, but intended as a mortgage, gives no notice to subsequent purchasers. In Nevada, subsequent purchasers and encumbrancers are deemed to have constructive notice under the statute of every conveyance affecting real estate, properly recorded.<sup>1</sup> In Ohio, the statute requiring mortgages to be recorded in a set of books denominated "record of mortgages," is considered to be merely directory to the recorder. It was therefore held that a mortgage deed delivered to the officer for registration, and recorded in a record-book called the "record of deeds," and indexed in both the index to the volume and the general index with the letters "mtg." annexed, is operative as a mortgage against a subsequent purchaser for value, although he had no actual notice of such mortgage.<sup>2</sup>

ant, admitting that the deed of the fifty lots was only held as a security, and that if the substituted notes were paid, the deed was to be given up, and the lots reconveyed. This agreement, operating as a defeasance or explanation of the design of the deed, was never registered, yet it is to be considered in connection with the deed, and relates back to its date, so as to render the deed from its commencement what it was intended to be by the parties, a mere mortgage, securing the payment of the notes. As a mortgage, the deed and the subsequent agreement ought to have been registered, to protect the land against the title of a subsequent *bona fide* purchaser. This is the language of the statute concerning the registry of mortgages; and recording the deed as a deed was of no avail in this case, for the plaintiff was not bound to search the record of deeds, in order to be protected against the operation of a mortgage." An instrument is recorded when filed for record although it may not be copied into the proper book: *Watkins v. Wilhoit*, 104 Cal. 395.

<sup>1</sup> *Grellett v. Heilshorn*, 4 Nev. 526. To operate as constructive notice, it has been held, the instrument must be recorded in the proper book: *Deane v. Hutchinson*, 40 N. J. Eq. 83; *Parsons v. Lent*, 34 N. J. Eq. 67; *Shaw v. Wilshire*, 65 Me. 485. But where a deed is considered recorded as soon as filed, see *Swenson v. Bank*, 9 Lea, 723; *Oluder v. Thomas*, 89 Pa. St. 343.

<sup>2</sup> *Smith Executor v. Smith*, 13 Ohio St. 532. See, also, *Salter v. Baker*, 54 Cal. 140; *Huffman v. Blum*, 64 Tex. 334; *Sleffian v. Bank*, 69 Tex. 513; *Cook v. Parham*, 63 Ala. 456; *Fargason v. Edrington*, 49 Ark. 207; *Chapman v. Miller*, 130 Mass. 289; *Brophy v. Brophy*, 15 Nev. 101. Al-



§ 631. A mortgagee is considered a purchaser.—A mortgagee<sup>1</sup> or a trustee in a deed of trust<sup>2</sup> is a purchaser, as the term is used in the recording acts. Two persons purchased for their joint benefit a quantity of land, contributing equal parts of the purchase money. They mutually agreed that conveyances of the property should be executed to one of them, who subsequently, with the knowledge and consent of the other, obtained from a bank a number of loans. The money thus obtained was expended in improving the property. These loans were secured by trust deeds executed by the party who had the legal title, and he afterward secured a sum of money from another bank, giving a mortgage therefor. The other partner in the joint purchase never exercised any authority or control over the property, and his rights were not evidenced by any writing. He brought an action to obtain a sale of the property, and to have the proceeds distributed among the parties entitled. It appeared that his partner, whom he made one of the defendants, paid the taxes on the property, it being assessed to him, and from the time of the original conveyance, until after the commencement of the action, always dealt with the property as though he were the sole owner. The bank mortgagee had no notice of any interest in plaintiff, and made the loan to his partner upon the faith of the latter's ap-

though the requirement of the statute, that a deed intended as a mortgage shall be recorded as a mortgage, is not complied with, it is valid between the parties: *James v. Morey*, 2 Cowen, 246; 14 Am. Dec. 475. The record becomes operative if, however, the mortgagee subsequently purchases the equity of redemption, or obtains it by any other means: *Warner v. Winslow*, 1 Sand. Ch. 430. A miscellaneous record-book used by the officer for the registration of exceptional instruments and properly indexed, is a proper record-book, and constructive notice is given to third persons by the record in it of a deed of standing timber: *Mee v. Benedict*, 98 Mich. 260; 39 Am. St. Rep. 543.

<sup>1</sup> *Moore v. Walker*, 3 Lea (Tenn.), 656; *Whelan v. McCreary*, 64 Ala. 319; *Haynsworth v. Bischoff*, 6 S. C. 159; *Jordan v. McNeil*, 25 Kan. 459; *Patton v. Eberhart*, 52 Iowa, 67; *Chapman v. Miller*, 130 Mass. 289; *Bass v. Wheelless*, 2 Tenn. Ch. 531; *Weinberg v. Rempe*, 15 W. Va. 829.

<sup>2</sup> *Kesner v. Trigg*, 98 U. S. 50; *New Orleans Canal etc. Co. v. Montgomery*, 95 U. S. 16.

parent title by deed, under the impression that the property was solely his. The court held that the claims of the plaintiff should be postponed to those of the mortgagee bank.<sup>1</sup>

§ 632. **Pre-existing debt.** — But a mortgage to secure a pre-existing debt is not generally considered as a purchase for a valuable consideration. Such a mortgagee, where this is held to be the law, is not entitled to protection against prior equities, although when he took his mortgage he had no notice of them.<sup>2</sup> “Although the

<sup>1</sup> *Salter v. Baker*, 54 Cal. 140. Said the court, per Ross, J: “There can be no doubt that the equities of the bank are superior to those of the plaintiff, who voluntarily permitted the title to the property to be placed in the name of Baker, and for a long series of years allowed him to appear as its absolute legal and equitable owner, and in all respects to deal with it as his own. The bank, ignorant of any interest in plaintiff, and relying upon the apparent ownership of Baker, loaned him its money, and should, in good conscience, be protected against the now asserted claim of plaintiff: *Rice v. Rice*, 2 Drew, 73; *Richard v. Sears*, 6 Ad. & E. 469; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; 7 Am. Rep. 341; Code Civil Procedure, § 3543.” See, also, *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542; *Porter v. Green*, 4 Iowa, 571; *Seever v. Delashmutt*, 11 Iowa, 174; 77 Am. Dec. 139.

<sup>2</sup> *Withers v. Little*, 56 Cal. 370; *De Lancey v. Stearns*, 66 N. Y. 157; *Westervelt v. Hoff*, 2 Sandf. Ch. 98; *Union Dime Savings Inst. v. Duryea*, 67 N. Y. 84; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Dickerson v. Tillinghast*, 4 Paige, 215; 25 Am. Dec. 528; *Padgett v. Lawrence*, 10 Paige, 170; 40 Am. Dec. 232; *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480; *Oary v. White*, 7 Lans. 1; s. c. 52 N. Y. 128; *Coddington v. Bay*, 20 Johns. 637; 11 Am. Dec. 342; *Stalker v. McDonald*, 6 Hill, 93; 40 Am. Dec. 389; *Hinds v. Pugh*, 48 Miss. 268; *Bartlett v. Varner*, 56 Ala. 580; *Pancoast v. Duval*, 28 N. J. Eq. 445; *Morse v. Godfrey*, 3 Story, 364; *Mingus v. Condit*, 23 N. J. Eq. 313; *Spurlock v. Sullivan*, 36 Tex. 511; *Wilson v. Knight*, 59 Ala. 172; *Gafford v. Stearns*, 51 Ala. 434; *Short v. Battle*, 52 Ala. 456; *Pickett v. Barron*, 29 Barb. 505; *Thurman v. Stoddart*, 63 Ala. 336; *Coleman v. Smith*, 55 Ala. 368; *Cook v. Parham*, 63 Ala. 456; *Alexander v. Caldwell*, 55 Ala. 517; *Schumpert v. Dillard*, 55 Miss. 348; *Perkins v. Swank*, 43 Miss. 349, 360; *Lawrence v. Clark*, 36 N. Y. 128; *Webster v. Van Steenberg*, 46 Barb. 211; *Clarke v. Barnes*, 72 Iowa, 563; *McKamey v. Thorpe*, 61 Tex. 653; *Funk v. Paul*, 64 Wis. 35; 54 Am. Rep. 576; *Sweeney v. Bixler*, 69 Ala. 539; *People's Sav. Bank v. Bates*, 120 U. S. 556. See, also, *Boxheimer v. Gunn*, 24 Mich. 372; *Edwards v. McKernan*, 55 Mich. 520; *Ashton's Appeal*, 73 Pa. St. 153; *Jones v. Robinson*, 77 Ala. 499; *Craft v. Russell*, 67 Ala. 9; *Banks v. Long*, 79 Ala. 319; *Saffold v. Wade*, 51 Ala. 214; *Summers*

plaintiff was a purchaser without notice, he was not a purchaser for value, and his conscience was as much bound by the prior equity of the defendant Jacks, as were the consciences of his mortgagors. In fact he occupied no better position than his mortgagors.”<sup>1</sup> But this rule is not universally accepted, and in some cases it is held that a mortgagee who in good faith takes a mortgage to secure a pre-existing debt, is entitled to be regarded as a purchaser for a valuable consideration, and to receive all the protection that results from this relation. But this latter view is not sustained by the weight of authority. A mortgagee who has not parted with value is considered to be in no worse position than he was before, and to be bound by the same equities that bound his mortgagor.<sup>2</sup>

*v. Brice*, 36 S. C. 204; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Johnson v. Graves*, 27 Ark. 557; *Golson v. Fielder*, 2 Tex. Civ. App. 400; *Overstreet v. Manning*, 67 Tex. 657; *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657; *Chance v. McWhorter*, 26 Ga. 315; *Phelps v. Fockler*, 61 Iowa, 340; *Koon v. Tramel*, 71 Iowa, 132. But a mortgage of this kind is valid between the parties: *Turner v. McFee*, 61 Ala. 468; *Steiner v. McCall*, 61 Ala. 413; *Brooks v. Owen*, 112 Mo. 251; *Smith v. Wooman*, 19 Ohio St. 145; *Paine v. Benton*, 32 Wis. 491; *Kranert v. Simon*, 65 Ill. 344; *Machette v. Wanless*, 1 Colo. 225.

<sup>1</sup> *Withers v. Little*, 56 Cal. 370, 373.

<sup>2</sup> *Babcock v. Jordan*, 24 Ind. 14. Elliott, C. J., said in this case: “The question raised by the reply is this, viz: Is the mortgagee of a mortgage taken in good faith to secure a pre-existing debt regarded as a purchaser for a valuable consideration, and protected as such? The replication under consideration assumes the negative; but the same question has been ruled affirmatively by this court, in the case of *Work v. Brayton*, 5 Ind. 396. Perkins, J., in delivering the opinion of the court in that case, says: ‘The question whether a mortgagee, in a mortgage given for the security of a pre-existing debt, is to be regarded as a purchaser for a valuable consideration has been decided differently by different courts; and there has been a like diversity of opinion upon the analogous question, whether the holder of commercial paper assigned as collateral security for a pre-existing debt is to be treated as a holder for a valuable consideration. The latter of these questions this court decided in the affirmative in *Valette v. Mason*, 1 Ind. 288; and it would seem that the principle of that case, applied to a mortgage of real estate to secure a like indebtedness, would require that to be regarded as a purchaser for a valuable consideration. . . . If it is not to be so regarded, the titles of purchasers and mortgagees for such a consideration must be of comparatively little value, as they may, at any time, be unexpectedly overrode by secret invisible liens for unpaid purchase money to some former grantors, or

§ 633. Assignee of a mortgage is considered a purchaser.—A person who purchases a mortgage is considered as coming within the operation of the registry acts, and is entitled to full protection as a *bona fide* purchaser. The fact that his assignor had notice of prior encumbrances upon the property described in the mortgage, does not affect him if he purchases in good faith and for a valuable consideration, and has his assignment recorded before the registration of the prior deed or encumbrance.<sup>1</sup> The assignee of a mortgage is entitled to the same consideration and as ample protection under the registry acts as a person who buys the equity of redemption.<sup>2</sup> If there is a prior outstanding mortgage at the time the assignment is made, of which the assignor had notice, and it is recorded before the assignment, it will take precedence over the latter. This would also be the case if the prior mortgage was recorded before the assignment was made, but after the registration of the assigned mortgage.<sup>3</sup> While an assignee of a mortgage is not chargeable with

by some other, till then unknown, alleged equitable claims, which might, in their origin, have been without trouble made secure by open recorded instruments that would have been notice to all the world. . . . A pre-existing debt is held to be a valuable consideration by Story in the second volume of his Equity Jurisprudence, pp. 657, 658, and he cites for the doctrine *Metford v. Metford*, 9 Ves. 100, and *Bayley v. Greenleaf*, 7 Wheat. 46. In vol. 2, pt. 1, p. 73, of *White and Tudor's Leading Cases in Equity*, they say: 'Similar decisions were made in *Richeson v. Richeson*, 2 Gratt. 497, and in *Dey v. Dunham*, 2 Johns. Ch. 182; though this latter case has not been followed in New York, Kent, in the fourth volume of his Commentaries, p. 154, approves the doctrine, and expresses the conviction that it rests on grounds that will command general assent.' "

<sup>1</sup> *Decker v. Boice*, 83 N. Y. 215.

<sup>2</sup> *Westbrook v. Gleason*, 79 N. Y. 23; *Smyth v. Knickerbocker L. Ins. Co.*, 84 N. Y. 589; *James v. Johnson*, 6 Johns. Ch. 417; *Campbell v. Vedder*, 1 Abb. App. Dec. 295; *Vanderkemp v. Shelton*, 11 Paige, 28; *Belden v. Meeker*, 47 N. Y. 307; *Purdy v. Huntington*, 46 Barb. 389; 42 N. Y. 334; 1 Am. Rep. 552; *Smith v. Keohane*, 6 Bradw. 585; *Turpin v. Ogle*, 4 Bradw. 611; *McClure v. Burris*, 16 Iowa, 591; *Bowling v. Cook*, 89 Iowa, 200; *Cornog v. Fuller*, 30 Iowa, 212; *Bank v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390; *Tradesmen's Building Assn. v. Thompson*, 31 N. J. Eq. 536; *Stein v. Sullivan*, 31 N. J. Eq. 409.

<sup>3</sup> *Fort v. Burch*, 5 Denio, 187; *De Lancey v. Stearns*, 66 N. Y. 157.

notice possessed by his assignor, he is bound by the constructive notice of the record and by the notice supplied by the possession and occupation of another of the premises embraced in the mortgage.<sup>1</sup> In case two assignments of the same mortgage are made, the general rule applies, and priority is given to the one who first records his assignment. In case he paid only a part of the consideration, he is entitled to precedence only to such part.<sup>2</sup> But generally the mortgagee would transfer the note to the assignee, and its absence would be a fact sufficient to put the second purchaser upon inquiry.<sup>3</sup>

§ 634. **Judgment creditors.** — By the rules of the common law, a judgment creditor was not regarded as a purchaser within the recording laws.<sup>4</sup> Unless this construction has been changed by statute, the same rule would obtain.<sup>5</sup> An attachment lien stands upon the same ground, so far as this question is concerned, as a judgment lien.<sup>6</sup> And generally a judgment or attaching creditor is not entitled to protection against an unrecorded

<sup>1</sup> *Bush v. Lathrop*, 22 N. Y. 535, 549; *Jackson v. Van Valkenburgh*, 8 Cowen, 260; *Jackson v. Given*, 8 Johns. 137; 5 Am. Dec. 328; *Trustees of Union College v. Wheeler*, 59 Barb. 585.

<sup>2</sup> *Wiley v. Williamson*, 68 Me. 71; *Pickett v. Barron*, 29 Barb. 505; *Potter v. Strausky*, 48 Wis. 235; *Purdy v. Huntington*, 46 Barb. 389.

<sup>3</sup> *Kellogg v. Smith*, 26 N. Y. 18. See *Brown v. Blydenburgh*, 7 N. Y. 141; 57 Am. Dec. 506. If a part of the mortgaged property is released from the operation of the mortgage, the release, to have full effect, should be recorded. It is considered as a conveyance affecting title to real estate. In case such a release is not recorded, a subsequent assignee of the mortgage, for a valuable consideration and without notice, is not affected by it: *Mutual Life Ins. Co. v. Wilcox*, 55 How. Pr. 43. The same rule manifestly applies in the case of an unrecorded agreement to release the mortgaged premises, or a part of them: *St. John v. Spalding*, 1 Thomp. & C. 483.

<sup>4</sup> *Brace v. Marlborough*, 2 P. Wms. 491; *Finch v. Winchelsea*, 1 P. Wms. 277.

<sup>5</sup> *Rodgers v. Gibson*, 4 Yeates, 111; *Heistner v. Fortner*, 2 Binn. 40; 4 Am. Dec. 417; *Cover v. Black*, 1 Pa. St. 493.

<sup>6</sup> *Plant v. Smythe*, 45 Cal. 161; *Le Olert v. Callahan*, 52 Cal. 252; *Hackett v. Callender*, 32 Vt. 97; *Hoag v. Howard*, 55 Cal. 564; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252.

deed.<sup>1</sup> Where a judgment creditor is not considered a purchaser, an unrecorded mortgage which is valid except as against *bona fide* purchasers and mortgagees for value and without notice, it has been decided a number of

<sup>1</sup> Bell v. Evans, 10 Iowa, 353; Sappington v. Oeschli, 49 Mo. 244; Kelly v. Mills, 41 Miss. 267; Boze v. Arper, 6 Minn. 220; Greenleaf v. Edes, 2 Minn. 264; Evans v. McGlasson, 18 Iowa, 150; Harrall v. Gray, 10 Neb. 186; Thomas v. Kelsey, 30 Barb. 268; Schmidt v. Hoyt, 1 Edw. 652; Buchan v. Summer, 2 Barb. Ch. 165; 47 Am. Dec. 305; Wilder v. Butterfield, 50 How. Pr. 385; Stevens v. Watson, 4 Abb. App. 302; Jackson v. Dubois, 4 Johns. 216; Floyd v. Harding, 28 Gratt. 401; Cowardin v. Anderson, 78 Va. 88; Hoag v. Howard, 55 Cal. 564; Galland v. Jackman, 26 Cal. 79; 85 Am. Dec. 172; Wilcoxson v. Miller, 49 Cal. 193; Pixley v. Huggins, 15 Cal. 127; Hoag v. Howard, 55 Cal. 564; Plant v. Smythe, 45 Cal. 161; Packard v. Johnson, 51 Cal. 545; Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543; Mansfield v. Gregory, 11 Neb. 297; Courtney v. Parker, 21 Neb. 582; Hubbard v. Walker, 19 Neb. 94; Dewey v. Walton, 31 Neb. 819; Galway v. Malchow, 7 Neb. 285; Hart v. Farmers and Mechanics' Bank, 33 Vt. 252; Hackett v. Callender, 32 Vt. 97; Fox v. Hall, 74 Mo. 315; 41 Am. Rep. 316; Stillwell v. McDonald, 39 Mo. 282; Draper v. Bryson, 26 Mo. 108; 69 Am. Dec. 483; Black v. Long, 60 Mo. 181; Potter v. McDowell, 43 Mo. 93; Masterson v. Little, 75 Tex. 682; Holden v. Garrett, 23 Kan. 98; Plumb v. Bay, 18 Kan. 415; Northwestern Forwarding Co. v. Mahaffey, 36 Kan. 152; Foltz v. Wert, 103 Ind. 404; Wright v. Jones, 105 Ind. 17; Shirk v. Thomas, 121 Ind. 147; 16 Am. St. Rep. 381; Heberd v. Wines, 105 Ind. 237; Boyd v. Anderson, 102 Ind. 217; Hays v. Reyer, 102 Ind. 524; Orth v. Jennings, 8 Blackf. 420; Shryock v. Waggoner, 28 Pa. St. 430; Cover v. Black, 1 Pa. St. 493; Knell v. Green St. Building Assn., 34 Md. 67; Hoy v. Allen, 27 Iowa, 208; Patterson v. Lindner, 14 Iowa, 414; Phelps v. Fockler, 61 Iowa, 340; Welton v. Tizzard, 15 Iowa, 495; First Nat. Bank v. Hayzlett, 40 Iowa, 659; Norton v. Williams, 9 Iowa, 528; Duncan v. Miller, 64 Iowa, 223; Churchill v. Morse, 23 Iowa, 229; 99 Am. Dec. 422; Sigworth v. Meriam, 66 Iowa, 477; Withnell v. Courtland Wago County, 25 Fed. Rep. 372; Vaughn v. Schmalsle, 10 Mont. 186; McAdow v. Black, 4 Mont. 475; Kelly v. Mills, 41 Miss. 267; Welles v. Baldwin, 28 Minn. 408; Dutton v. McReynolds, 31 Minn. 66; Forepaugh v. Appoid, 17 B. Mon. 625; Righter v. Forrester, 11 Bush, 278; Morton v. Robards, 4 Dana, 258; Pearson v. Davis, 41 Neb. 608; 59 N. W. Rep. 885. In Sappington v. Oeschli, *supra*, the court said: "Ever since the decision in the case of Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec. 105, it has been the settled law of this State, that the title of a *bona fide* purchaser or mortgagee under a deed or mortgage not recorded. is good against creditors at large, and is also good against sales under judgments, and executions, if the deed or mortgage is duly recorded before such sales. This has been the uniform ruling of this court since the decision referred to: See Valentine v. Havener, 20 Mo. 133; Stilwell v. McDonald, 39 Mo. 282; Porter v. McDowell, 43 Mo. 93; Reed v. Ownby, 44 Mo. 204."



times, has preference over a judgment lien.<sup>1</sup> Speaking of the effect of a judgment lien upon the real estate of a debtor, Chief Justice Wright of Iowa observed: "It is the *property* of the *debtor*, which is bound by the attachment from the time of service, and not the property of another. So, also, the judgment is a lien upon the real estate owned by the defendant at the time of its rendition, and not upon that owned by another. It is true that the phrase 'real estate' includes lands, tenements, and hereditaments and all rights thereto and interests therein, equitable as well as legal, but the judgment lien only extends to the interest owned by the defendant. If he has no interest, legal or equitable, there is nothing upon which the judgment can rest; nothing to which the lien can attach. Again, while principles of public policy have dictated the equitable rule, that relief should not generally be granted against a *bona fide* purchaser without notice, yet the rule has no place in favor of a judgment creditor, though he may have no notice of the outstanding equity. And the reason of this exception seems to us very cogent and satisfactory. The ordinary purchaser pays a new consideration. Not so with the judgment creditor. Such creditor comes in *under* the debtor, and not, as does the purchaser, *through* him. The consequence is that the creditor is entitled to the same rights as the *debtor* had, and no more. By his purchase he stands in the place of the debtor. And the same rule applies to a third person purchasing at the sheriff's sale, with notice of the outstanding title."<sup>2</sup> In a later case in the same State, Day, J., said: "It is now

<sup>1</sup> *Hoy v. Allen*, 27 Iowa, 208; *Pixley v. Huggins*, 15 Cal. 127; *Burgh v. Francis*, 1 Eq. Cas. Abr. 320, pt. 1; *Patterson v. Linder*, 14 Iowa, 414; *Welton v. Tizzard*, 15 Iowa, 495; *Jackson v. Dubois*, 4 Johns. 216; *Holden v. Garrett*, 23 Kan. 98; *Righter v. Forrester*, 1 Bush, 278; *Orth v. Jennings*, 8 Blackf. 420.

<sup>2</sup> In *Norton v. Williams*, 9 Iowa, 528, 531. See, also, *Schmidt v. Hoyt*, 1 Edw. Ch. 652; *First Nat. Bank of Tama City v. Hayzlett*, 40 Iowa, 659; *Churchill v. Morse*, 23 Iowa, 229; 92 Am. Dec. 422; *Evans v. McGlasson*, 18 Iowa, 150; *Morton v. Robards*, 4 Dana, 258; *Burn v. Burn*, 3 Ves. 582; *Hayes v. Thode*, 18 Iowa, 51; *Hoy v. Allen*, 27 Iowa, 208. And see *McKee v. Sultenfuss*, 61 Tex. 325.



the settled law of this State that an attachment or judgment lien does not take precedence over a prior unrecorded deed or mortgage of which the creditor had no notice."<sup>1</sup> Where a deed is executed before the rendition of a judgment against the grantor, but not recorded, it is good as against a sheriff's sale made on the judgment, if it is placed on record before the sheriff's deed.<sup>2</sup>

**§ 635. In some States judgment creditor is considered within the registry acts.**—In other States of the Union, a judgment lien has priority over an unrecorded deed or mortgage, of which the judgment creditor had no notice at the time his lien attached.<sup>3</sup> In Alabama, the court,

<sup>1</sup> In *First Nat. Bank etc. v. Hayzlett*, 40 Iowa, 659.

<sup>2</sup> *Wilcoxson v. Miller*, 49 Cal. 193; *Schoeder v. Gurney*, 73 N. Y. 430; *Apperson v. Burgett*, 33 Ark. 328. But see *Simpkinson v. McGee*, 4 Lea (Tenn.), 432.

<sup>3</sup> *Hill v. Paul*, 8 Miss. 479; *Guiteau v. Wisely*, 47 Ill. 433; *Pollard v. Cocke*, 19 Ala. 188; *Humphreys v. Merrill*, 52 Miss. 92; *McCoy v. Rhodes*, 11 How. 131; *Vreeland v. Claffin*, 24 N. J. Eq. 113; *Reichert v. McClure*, 23 Ill. 516; *McFadden v. Worthington*, 45 Ill. 362; *Massey v. Westcott*, 40 Ill. 160; *Young v. Devries*, 31 Gratt. 304; *Eidson v. Huff*, 29 Gratt. 338; *Grace v. Wade*, 45 Tex. 523; *Cavanaugh v. Peterson*, 47 Tex. 198; *Andrews v. Matthews*, 59 Ga. 466; *Mainwaring v. Templeman*, 51 Tex. 205; *Firebaugh v. Ward*, 51 Tex. 409; *Anderson v. Nagle*, 12 W. Va. 98; *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744; *Corpman v. Backastow*, 84 Pa. St. 363; *McKeen v. Sultenfuss*, 61 Tex. 325; *Ranney v. Hogan*, 1 Un. Cas. 253; *Arledge v. Hail*, 54 Tex. 398; *Grimes v. Hobson*, 46 Tex. 416; *Stevenson v. Texas Ry. Co.*, 105 U. S. 703; *Baker v. Woodward*, 12 Or. 3; *Dickey v. Henarie*, 15 Or. 351; *United States v. Griswold*, 7 Saw. 311; *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657; *Westervelt v. Voorhis*, 42 N. J. Eq. 179; *Sharp v. Shea*, 32 N. J. Eq. 65; *Hoag v. Sayre*, 33 N. J. Eq. 552; *King v. Paulk*, 85 Ala. 186; 4 So. Rep. 825; *Barker v. Bell*, 37 Ala. 354; *Howell v. Brewer* (N. J. Ch.), 5 Atl. Rep. 137; *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541; 19 Am. St. Rep. 259; 45 N. W. Rep. 1136; *Lamberton v. Merchants' Bank*, 24 Minn. 281; *Berryhill v. Smith*, 59 Minn. 285; 61 N. W. Rep. 144; *Mississippi Valley Co. v. Chicago St. L. & N. O. R. Co.*, 58 Miss. 896; 38 Am. St. Rep. 348; *Moor v. Watson*, 1 Root, 388; *Guerrant v. Anderson*, 4 Rand, 208; *Heermans v. Montague* (Va., March 30, 1890), 20 S. E. Rep. 899; *Butler v. Maury*, 10 Humph. 420; *Hitz v. National Metropolitan Bank*, 111 U. S. 722; *Gallagher v. Galletley*, 128 Mass. 367; *Coffin v. Ray*, 1 Met. 212; *Paine v. Mooreland*, 15 Ohio, 435; 45 Am. Dec. 585; *Holliday v. Franklin Bank*, 16 Ohio, 533; *Mayham v. Coombs*, 14 Ohio, 428; *Holliday v. Franklin Bank*, 16 Ohio, 533; *Fosdick v. Barr*, 3 Ohio St. 471;

speaking of the registry act in force in that State, says: "If the deed is not recorded within six months, nor until after a judgment is rendered against the vendor, the subsequent registration of the deed does not relate back so as to defeat the lien of the judgment, but the statute avoids this deed in favor of the judgment creditor who has no notice of such deed, either actual or constructive, at or before the rendition of such judgment. A notice acquired before the sale, but after the lien attaches, cannot operate to divest the lien or affect the title of a purchaser under the judgment."<sup>1</sup> In Illinois, the rule was established at an early day, that under the statutes of that State, a purchaser, and a judgment creditor possessing a lien, stood upon the same equity, and were equally entitled to protection against prior unrecorded deeds of which they had no notice. From this, the conclusion follows, that a judgment lien attaches to whatever interest the records disclose the judgment debtor to have, if the judgment creditor has not actual notice from other sources. His lien is not restricted to the interest that the debtor actually has, but will take precedence over a prior unrecorded deed.<sup>2</sup>

*Tousley v. Tousley*, 5 Ohio St. 78; *White v. Denman*, 16 Ohio, 59; 1 Ohio St. 110; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Main v. Alexander*, 9 Ark. 112; 47 Am. Dec. 732; *Hawkins v. Files*, 51 Ark. 417; *Munford v. McIntyre*, 16 Ill. App. 316; *McFadden v. Worthington*, 45 Ill. 362; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Roane v. Baker*, 120 Ill. 308; 11 N. E. Rep. 246.

<sup>1</sup> *Pollard v. Cocke*, 19 Ala. 188, 195. See *Daniels v. Sorrells*, 9 Ala. 436; *Fash v. Ravesies*, 32 Ala. 451; *De Vendell v. Hamilton*, 27 Ala. 156.

<sup>2</sup> *Massey v. Westcott*, 40 Ill. 160. Said Mr. Justice Lawrence: "It is insisted that Till and Knevels, even if they had no notice, are not entitled to protection as judgment creditors, because they have parted with nothing, and have less equity than would a subsequent purchaser. Under our statutes a purchaser and a judgment creditor having a lien stand upon the same equity, and this has been so held ever since the Act of 1833, and the case of *Martin v. Dryden*, 1 Gilm. 216. The same remark applies to another point made by appellant's counsel, to wit, that the lien of a judgment attaches only to whatever interest in land the judgment debtor may, in fact, have, and does not take precedence of a prior purchaser claiming under an unrecorded deed. This has been so held in some of the States, but under our Act of 1833, it is the settled

§ 636. **Actual notice subsequent to the lien in these States.**—In those States where a judgment lien is considered as within the registry laws, the lien of the judgment creditor becomes perfect at the time it attaches, unless he had notice of the prior unrecorded deed. If he acquires notice subsequently, he is not affected by it. The notice must be brought home to him before he acquired his lien. Simrall, C. J., said that the statute of Mississippi may receive this paraphrase: "A purchaser must record his deed at his peril, for if he does not, it shall be void as to that creditor of the vendor who acquires a lien on the property before he gets notice of the sale. Within the meaning of the words, as construed by the courts, the creditor has established his right to satisfaction of his debt out of the property if he has obtained a lien before he receives notice of the conveyance." "There is but one class of creditors who may avoid an unregistered deed—those who have obtained *liens* without notice; subsequent notice no more affects them than it would a purchaser who got the title before notice."<sup>1</sup>

§ 637. **Purchasers at execution sale.**—It is settled by the weight of authority that a purchaser at an execution sale, other than the judgment creditor himself, is a *bona fide* purchaser for a valuable consideration, and entitled to the protection of the registry acts. He occupies the same position, and is entitled to the same rights as a purchaser from the grantor at a private sale. If he had, at the time of the sale, no actual or constructive notice of the claims of third persons, he takes the premises, as would any other purchaser, freed from all equities of which he had no actual notice, and which the proper records failed to disclose.<sup>2</sup> "And though our statute," said Chief Justice

law of this State that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of actual notice from other sources." See, also, *McFadden v. Worthington*, 45 Ill. 362; *Guiteau v. Wisely*, 47 Ill. 433.

<sup>1</sup> *Loughridge v. Bowland*, 52 Miss. 516, 558.

<sup>2</sup> *Ehle v. Brown*, 31 Wis. 414; *Morrison v. Funk*, 23 Pa. St. 421; *Gar-*

Savage, "does not save the rights of judgment creditors, and the judgment alone is unavailing as an encumbrance against an unrecorded deed, yet when that judgment is enforced, and a sale is made upon execution, and the sheriff's deed is first recorded, the purchaser becomes a *bona fide* purchaser, and in that character, is entitled to the property in preference to the grantee in the unrecorded deed. Such is my understanding of the law, and such is the current of authority as I read the cases."<sup>1</sup> In an early case in New Jersey, Drake, J., said: "There is no well-founded distinction between purchasers at sheriff's sale, and purchasers at private sale. The term 'purchaser' is equally applicable to both, and good policy requires that the former should be protected as well as the latter."<sup>2</sup> In a case in Wisconsin, the court intimated that if mortgaged premises were, at the time of the sale, occupied by a tenant of the grantee, this circumstance was perhaps sufficient to put the purchaser on inquiry, and to affect him with notice of the interests of the grantee under the unrecorded deed. But the court held that if the purchaser at the foreclosure sale took possession of the premises, protection would be given, under the registry law, to one who afterward bought the land of the execution purchaser in good faith, for value, before the adverse deed was recorded.<sup>3</sup> It is, however, held in

wood v. Garwood, 9 N. J. L. 193; Den v. Richman, 13 N. J. L. 43; Paine v. Moorland, 15 Ohio, 435; 45 Am. Dec. 585; Jackson v. Chamberlin, 8 Wend. 625; Ayres v. Duprey, 27 Tex. 605; 86 Am. Dec. 657; McNett v. Turner, 16 Wall. 352; Savery v. Browning, 18 Iowa, 246; Runyan v. McClellan, 24 Ind. 165; Davis v. Ownsby, 14 Mo. 170; 55 Am. Dec. 105. See, also, Evans v. McGlasson, 18 Iowa, 150; Waldo v. Russell, 5 Mo. 387; Draper v. Bryson, 26 Mo. 108; 69 Am. Dec. 483; Scribner v. Lockwood, 9 Ohio, 184; Jackson v. Post, 15 Wend. 588; Fords v. Vance, 17 Iowa, 94; Stilwell v. McDonald, 39 Mo. 282; Thomas v. Vanlieu, 28 Cal. 616; Holmes v. Buckner, 67 Tex. 107; Lee v. Birmingham, 30 Kan. 312.

<sup>1</sup> In Jackson v. Chamberlin, 8 Wend. 625, 626.

<sup>2</sup> In Den v. Richman, 1 Green, 43, 59.

<sup>3</sup> Ehle v. Brown, 31 Wis. 405. Mr. Chief Justice Dixon, on application for rehearing, discussed the rights of purchasers at execution sales at considerable length, and after an examination of the cases, remarked: "There can be no doubt, we think, of the correctness of the position

Mississippi that judgment creditors or purchasers at a sheriff's sale are not purchasers for a valuable consideration, but, in contemplation of a court of equity, mere volunteers.<sup>1</sup>

**§ 638. Purchaser at such sale with notice.**—Obviously, a purchaser at an execution sale, where a judgment is not superior to an unrecorded deed, can be in no more favorable position than he would be if he were buying at private sale. We have seen that the law makes no distinction between him and the ordinary purchaser. He is entitled to the same privileges, and he is bound by the same notice. If, therefore, at the time of the sale, he has actual notice of the rights of others, or constructive notice, by the registration before sale of the instruments evidencing or conferring those rights, or, if the party,

thus generally assumed by the authorities, that the statute is to be fairly and liberally construed, so as to prevent and obviate the mischiefs and abuses which it was the design of the legislature to remedy. The statute was made to prevent those who once had title to land from making successive sales, and thereby defrauding one or more of the purchasers which, at common law and without the statute might be done; and, as a means of accomplishing that object, to protect innocent purchasers, buying and paying their money on the credit of the recorded title, who should themselves testify their appreciation of, and proper regard for, the rights of others, by complying with the condition or requirement of the statute in causing their own deeds to be duly recorded. Such is the object, and such is the justice and policy of the law, for the protection of innocent purchasers who have acquired the ostensible title exhibited and shown by the record. For their protection and safety, prior unrecorded conveyances and titles must yield, and must be invalidated. In view of this object and of this policy, and of the manifest justice of the ends to be attained, it would require very urgent considerations indeed to induce us to put a construction upon our registry law against its letter, which would enable a purchaser to keep his deed in his own custody and unrecorded for years, and suffer the title of record of his grantor, and the possession of the land, to pass into the hands of one innocent purchaser for value, whose deed should be first recorded, or, as in this case, into and through the hands of several such purchasers in succession, and yet, after all this had been done, then to record his deed, and assert and maintain his paramount title, and uproot and destroy that of one or all of such innocent purchasers."

<sup>1</sup> Kelly v. Mills, 41 Miss. 267, overruling Kilpatrick v. Kilpatrick, 23 Miss. 124; 55 Am. Dec. 79.

equitably entitled to the property, is in possession, the title the purchaser acquires is subject to such rights or interests.<sup>1</sup> "It is the settled doctrine of this court that, under our present registry laws, the lien of a judgment, before sale thereunder, does not take precedence of a prior unrecorded mortgage; and that, if (as in this instance) the mortgage be recorded before the sheriff's sale, the purchaser at such sale will be affected with notice."<sup>2</sup>

**§ 639. Rights of judgment creditor as purchaser—**  
**Comments.**—A purchaser at an execution sale is, as we have shown, entitled to all the protection of the registry laws. If he buys without notice, he is a *bona fide* purchaser, and the deed executed by the sheriff to him will take precedence over a prior unrecorded conveyance of which he had no notice. But suppose the judgment creditor becomes himself a purchaser at the sheriff's sale? He may purchase the property, and the amount of his bid may be in total or partial satisfaction of his claim. Is he entitled to the benefit of the registry laws? Is he protected from all prior unrecorded deeds and encumbrances of which he had no notice at the time of the sale? The question of whether he occupies the position of a stranger, and is entitled to the same privileges and protection, or is to be regarded as a mere volunteer, succeeding to the rights of the judgment debtor only, is one of interest, and one upon which the decisions are not uniform.

**§ 640. General rule that judgment creditor is not a bona fide purchaser.**—The rule maintained by the weight

<sup>1</sup> *Valentine v. Havener*, 20 Mo. 133; *Byers v. Engles*, 16 Ark. 543; *Chapman v. Coats*, 26 Iowa, 288; *Hoy v. Allen*, 27 Iowa, 208; *Hackett v. Callender*, 32 Vt. 97; *Priest v. Rice*, 1 Pick. 164; 11 Am. Dec. 156; *Apperson v. Burgett*, 33 Ark. 328; *Schroeder v. Gurney*, 73 N. Y. 480; *Potter v. McDowell*, 43 Mo. 93; *Righter v. Forrester*, 1 Bush, 278; *Sappington v. Oeschli*, 49 Mo. 244; *Black v. Long*, 60 Mo. 181; *Fox v. Hall*, 74 Mo. 315; 41 Am. Rep. 316.

<sup>2</sup> *Chapman v. Coats*, 26 Iowa, 291; *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105.

of authority, is that a judgment creditor who takes the property in part or total satisfaction of his demand, is not a purchaser entitled to protection against unrecorded conveyances. "To constitute a person a *bona fide* purchaser within the meaning of the statute, he must, upon the faith of the purchase, have advanced for it a valuable consideration. If he was a creditor antecedent to the purchase, and paid for the purchase by a credit on his demand, then inasmuch as he has parted with no consideration on the faith of the purchase, he is not a *bona fide* purchaser within the meaning of the statute."<sup>1</sup> A bank became a purchaser at an execution sale of the property of its judgment debtor, and received a certificate of purchase from the sheriff. Subsequently, the bank by an instrument in writing assigned the sheriff's certificate to a third party, releasing to him all its right and title to the land, and authorizing the sheriff to execute a conveyance to him. The latter attempted to obtain a deed from the sheriff, but on account of his absence from home accepted a deed from the judgment debtor, in place of the sheriff's deed. A judgment creditor of the bank afterward obtained a conveyance of the premises from the sheriff on the assumption that they were the property of the bank. It was held that the deed of the judgment debtor might, by agreement of the parties, be lawfully substituted instead of that of the sheriff, and that by such substitution, the sheriff's sale was virtually subverted, and that officer was divested of all power to convey the premises for the benefit of a third person. It followed as a consequence that the conveyance from the sheriff to the plaintiff was void, and further that

<sup>1</sup> Ayres v. Duprey, 27 Tex. 593; 86 Am. Dec. 657; Wright v. Douglas, 10 Barb. 97; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Orme v. Roberts, 33 Tex. 768; McAdow v. Black, 6 Mont. 601; 13 Pac. Rep. 377; Rutherford v. Green, 2 Ired. Eq. 121; Mansfield v. Gregory, 8 Neb. 432; O'Rourke v. O'Connor, 39 Cal. 442; Emerson v. Sansome, 41 Cal. 552; Harral v. Gray, 10 Neb. 186; Carney v. Emmons, 9 Wis. 114; Treptow v. Buse, 10 Kan. 170; National Bank v. King, 110 Ill. 254; Shirk v. Thomas, 121 Ind. 147; 16 Am. St. Rep. 381. See Blankenship v. Douglas, 26 Tex. 225; 82 Am. Dec. 608. And see Hunter v. Watson, 12 Cal. 263; 73 Am. Dec. 543.



the assignee of the bank had the equitable title by the assignment of the sheriff's certificate, and the legal title by the deed of the judgment debtor, and both being united in him, they constituted a perfect title to the premises. The court also held that no stranger could object to the sheriff's conveyance to the bank's assignee, and that to constitute a person a *bona fide* purchaser, he must have advanced a new consideration for the purchase; bidding off the premises and applying the bid on his judgment will not constitute a *bona fide* purchase, for no consideration is *advanced* on the faith of the purchase.<sup>1</sup> This principle is analogous to that which prevails where there is an unrecorded mortgage, and the mortgagor conveys the premises to a creditor having no notice of the mortgage, in payment of a precedent debt. It is held that, in such a case, the creditor is not a *bona fide* purchaser within the meaning of the registration laws, so as to entitle his deed to precedence over the prior unrecorded mortgage.<sup>2</sup>

<sup>1</sup> Wright v. Douglas, 10 Barb. 97. Speaking of the latter proposition, as to whether a judgment creditor is a *bona fide* purchaser, Gridley, P. J., at page 106, said: "It is contended that inasmuch as the deed from Dennis to Dana was not recorded, the plaintiff when he purchased on the judgment obtained in the attachment suit in 1844, was a *bona fide* purchaser. The counsel for the plaintiff argued as though the levy of his attachment was in the nature of a purchase, but that idea cannot be supported. It was only when he purchased his premises on his execution, that he can claim to be a purchaser at all. But I do not think that he can be regarded as a *bona fide* purchaser for two reasons: *First*, to constitute a *bona fide* purchaser, he must have *advanced the consideration for the purchase*. It will not constitute a *bona fide* purchase that the creditor bids off the premises and applies the bid on his judgment. *That* is a precedent debt, and the consideration is not *advanced* on the faith of the purchase: 1 Rev. Stats, 746, § 1; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Ooddington v. Bay, 20 Johns. 637; 11 Am. Dec. 342. *Second*, I am constrained to say that the plaintiff had notice enough to put him on inquiry, if not to charge him with a knowledge of the defendant's title. The tripartite deed was on record when he purchased at the execution sale. *That* was enough to put him on inquiry as to the exact terms of the deed from Dennis to Dana. Again, it is fair to conclude that the defendant, or some one under whom he claimed, was in possession. The defendant was in possession at the commencement of this suit. When did he acquire the possession? Most probably when he took the tripartite deed."

<sup>2</sup> Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528.

§ 641. **Contrary rule in Iowa.**—In Iowa, there have been several decisions on the question as to whether a judgment creditor, purchasing at a sheriff's sale, is affected by the existence of an unrecorded deed of which he had no notice. In one of these cases the judgment debtor held the legal title to the lands in controversy under an implied trust. After the rendition of judgment against him, but before the filing of a transcript of the judgment in the county in which the lands were situated, he conveyed them to the *cestui que trust*, who neglected the filing of his deed until eight months after the sale by the sheriff to the judgment creditor. The latter purchased without any notice of the deed to the *cestui que trust*, or of his rights in the premises. It was held that the judgment creditor stood on the same footing as any other *bona fide* purchaser, and would be afforded protection from an unrecorded deed, or outstanding equities, of which at the time of his purchase he had no notice.<sup>1</sup> Although it had previously been decided<sup>2</sup> that a judgment creditor, by merging his judgment into a title, without notice of prior equitable claims, became a *bona fide* purchaser, and as such entitled to the same protection as other subsequent purchasers, in the absence, of course, of equitable circumstances, yet, it was said that the course of decision had been vacillating, and the rule could not be declared to be established. "It is well settled that a *third person*, who purchases at a sheriff's sale," said Chief Justice Day, "without notice of outstanding equities, is entitled to the same protection as any other purchaser without notice and for value. The rule, however, as to the judgment creditor has oscillated somewhat, and can scarcely yet be regarded as settled in this State."<sup>3</sup> Sub-

<sup>1</sup> Gower v. Doheney, 33 Iowa, 36.

<sup>2</sup> Halloway v. Platner, 20 Iowa, 121; 89 Am. Dec. 517.

<sup>3</sup> Gower v. Doheney, 33 Iowa, 38. Continuing, the court said: "In Norton, Jewett & Busby v. Williams, 9 Iowa, 529, which was an action of right, it was said that the rule that relief should not generally be granted against a *bona fide* purchaser without notice has no place in favor of a judgment creditor, though he may have no notice of an out-

sequently it was held in the same State, that if the judgment debtor neglects to give notice of appeal until after a sale of the property under the judgment is made, and the judgment creditor becomes the purchaser, he is en-

standing equity. As the purchaser in that case, however, was a *third party*, with both *actual* and *constructive* notice of the outstanding deed, which was filed for record after judgment, but *before* the sheriff's sale, this point was not involved in that case, and what is said in regard to it is only a *dictum*. In the case of *Parker v. Pierce*, 16 Iowa, 227, the question whether a purchaser, at a sale under execution, will take the land discharged of every claim or title, whether arising on an unregistered deed or a mere equity, was expressly left undecided. In the case of *Vannice v. Bergen*, 16 Iowa, 556, 85 Am. Dec. 531, it was maintained by Justice Dillon, in his dissenting opinion, that a purchaser at a sheriff's sale will take the land discharged of every claim or title, whether arising under an unregistered deed or a mere equity, of which he had no notice at the time of his purchase, and which would be invalid against an ordinary purchaser; and that 'the rule applies equally when the judgment creditor is the purchaser, as when the purchase is made by a stranger.' In the case of *Evans v. McGlasson*, 18 Iowa, 152, the court united in holding that a judgment creditor, who becomes a purchaser at sheriff's sale, is protected at law against matters of which, at the time of the purchase, he had no notice, and that this rule also obtains in equity, unless there are equities of so strong and persuasive a nature as to prevent its application; and these, if they are relied upon, must be *alleged* and *proved*. As no such equities have been established in the present case, the doctrine of *Evans v. McGlasson* may be regarded as direct authority for sustaining the title of the plaintiff. But the rights of the judgment creditor received more direct recognition in the case of *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517, in which it was held that when a creditor merges his judgment into a title without actual or constructive notice of prior equities he becomes a purchaser within the meaning of section 2220 of the Revision, and is entitled to equal protection, in the absence of equitable circumstances, with any other subsequent *bona fide* purchaser. We attach no importance, under the circumstances of the case, to the delay in obtaining the sheriff's deed. Had the deed been procured and placed upon record at the time of the expiration for redemption. White would, so far as appears, have occupied precisely the same position as now. It is not shown that he has sustained any loss, even to the amount of the filing fee of his deed, from the delay in procuring the sheriff's deed. When Hampton conveyed to him, the judgment was not a lien upon the property conveyed. If the subsequent taking of the property to satisfy Hampton's debt gave White any right of action against him, it does not appear but that he was just as solvent when the sheriff's deed was procured as when the year for redemption relapsed." "It is a wholesome rule of equity that where one of two innocent persons must suffer, the loss will fall upon that party who has been guilty of the first negligence."

titled to the same protection as any other *bona fide* purchaser, if the judgment is afterward reserved, and he, on a new trial, again recovers judgment. This rule was applied in a case where, after the sale on execution, and while the appeal was pending, the judgment debtor sold the property to another person. The latter brought an action to restrain the judgment creditor from selling the property on execution issued on his second judgment. The court held, however, that the judgment creditor had a perfect title, and refused to enjoin the sale.<sup>1</sup>

<sup>1</sup> *Frazier v. Crafts*, 40 Iowa, 110. Day, J., delivered the opinion of court, and said: "The case presents this question: May a judgment creditor who purchases real estate at sheriff's sale, before notice of appeal, upon which the judgment under which the sale occurred is afterward reversed, but who, when the cause is remanded, recovers another judgment for the whole amount of the first and interest, under any circumstances be considered a *bona fide* purchaser, and be entitled as such to the protection of the provisions of section 3541 of the Revision? Or, in other words, can a judgment debtor whose real estate has been sold to the judgment plaintiff in satisfaction of the judgment before notice of appeal, after the judgment under which the sale occurred has been reversed, and the cause has been remanded for a new trial, and after the sheriff's deed to the judgment plaintiff has been recorded, sell the real estate to a third party and convey a valid title thereto, notwithstanding judgment is again rendered on a new trial for the full amount of the former judgment? These questions have not hitherto been answered by the adjudications of this court. The case of *Twogood v. Franklin*, 27 Iowa, 239, upon which appellant seems to rely, differs from the present one in two material respects: (1) The purchase was made after notice of the appeal. (2) The party under whose judgment the sale occurred failed, after the reversal, to recover another judgment. The language upon which appellant relies, 'that, to constitute a *bona fide* purchaser of land, one must have purchased without knowledge, at least actual knowledge, of an appeal, and must have parted with his money, or altered his situation on the strength of such purchase,' expresses merely the views of the writer of the opinion. The only point determined in that case is, 'that a purchase of land at a sheriff's sale by the plaintiff in execution, or his attorney, with actual knowledge of a depending appeal, is at the peril of the purchaser, and the party or his attorney thus buying is not, within the meaning of the statute, a *bona fide* purchaser.' The question now involved may fairly be regarded as *res nova*. No good reason is apparent why, under the circumstances of this case, a judgment plaintiff should not be protected. If, upon the retrial, he had failed to recover judgment, he would stand in an attitude altogether different. Under such circumstances he would be bound to make restitution to the judgment defendant. And so long as the title to the land remained in

§ 641 a. In other States.—It is held in Texas, that the lien acquired by a creditor without notice by the judgment and levy of execution is superior to the title founded on an unrecorded deed, and that a purchaser under the execution with notice, is entitled to all the

him, equity would require that he restore the land itself, the very thing improperly received in satisfaction of a judgment which ought never to have been rendered. And if he could thus be required to restore the land to the judgment defendant, he might be compelled to restore it to the vendee of such defendant. But in this case the recovery of a second judgment for the full amount of the first judgment and interest has definitely settled the question that Crafts is under no obligation to make restitution to Clark. If Clark had brought an action to recover the value of the land, it is clear that Crafts might have offset the claim by the second judgment. And if Clark had sought to recover the land itself, and had even succeeded, it would have been in his hands subject to the lien of such judgment. The true principle upon which *bona fide* purchasers, at a judicial sale, are protected in the rights acquired, we apprehend to be that they have a right to rely upon the validity of the judgment, and to invoke its protection for acts done under it whilst it is in force. If this be the principle, then there is no reason why a party acting in every respect in good faith and before notice of appeal, should not be protected to the same extent as strangers. In *Gower v. Doheney*, 33 Iowa, 39 (not cited by either party to this appeal), are reviewed all the previous decisions of this court cited by the appellee upon the question of the protection to be afforded to a judgment creditor, purchasing at a judicial sale, against outstanding equities, and we held that he was entitled to protection against such equities of which he had no notice at the time of his purchase. This decision is put upon the ground that the judgment plaintiff stands upon the same footing as any other purchaser. The principle determined in that case is decisive of this. The doctrine here maintained does not enable a party to retain property acquired under an unjust judgment. If the judgment is ultimately reversed, he must restore the property itself, or its value. Besides the judgment, defendant has it always in his power, by promptly taking an appeal, to prevent the judgment creditor from becoming a *bona fide* purchaser: See *Woodcock v. Bennett*, 1 Cowen, 711, 734; 13 Am. Dec. 568."

The general rule as to the restitution of property purchased under a judgment is that if third persons become the purchasers, their title is not divested by a subsequent reversal of the judgment. This rule is adopted to encourage bidding at judicial sales, and rests on consideration of public policy: *Frost v. McLeod*, 19 La. Ann. 69; *Farmer v. Rogers*, 10 Cal. 335; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459; *Gott v. Powell*, 41 Mo. 416; *Woodcock v. Bennett*, 1 Cowen, 711; 13 Am. Dec. 568; *Flaster v. Fleming*, 56 Ill. 457; *Hubbell v. Broadwell's Heirs*, 8 Ohio, 120; *Coster v. Peters*, 7 Robt. 386; *Jesup v. City Bank*, 15 Wis. 604; 82 Am. Dec. 703; *Porter v. Robinson*, 3 Marsh. A. K. 253; 13 Am. Dec. 153;

rights of the creditor. It was said by the court: "Now, if the unrecorded instrument cannot take effect, but is void as to creditors, it is absurd to say that the creditor's lien does not bind the land to which it applies, or that it cannot be enforced by the sale of the land so bound by it for the payment of the debt, just as if no such instrument existed. And it would be equally as absurd to say that the right acquired by the creditor by his lien, not merely to purchase himself, but to have the lien sold in open market, when once secured can be taken away by the subsequent record of such instrument, or that the party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satisfaction and discharge of his demand, except by becoming himself the purchaser."<sup>1</sup>

§ 642. **Comments.**—In those States where the judgment lien is entitled to precedence over an unrecorded deed or encumbrance, this question cannot arise. If the lien of the judgment is superior, so must be the title ac-

*Hauschild v. Stafford*, 27 Iowa, 301; *Dorsey v. Thompson*, 37 Md. 25; *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Lovett v. German Reformed Church*, 12 Barb. 67; *Leslie v. Richardson*, 60 Ala. 563; *Marks v. Cowles*, 61 Ala. 299; *Pitfield v. Gazzam*, 2 Ala. 325; *Fergus v. Woodworth*, 44 Ill. 374; *Stinson v. Ross*, 51 Me. 556; 81 Am. Dec. 591; *Taylor v. Lauer*, 26 La. Ann. 307; *Stroud v. Casey*, 25 Tex. 740; 78 Am. Dec. 556; *Irwin v. Jeffers*, 3 Ohio St. 389. It is said that the same rule applies to the assignee of the judgment creditor who has become a purchaser: *Horner v. Zimmerman*, 45 Ill. 14; *Vogler v. Montgomery*, 54 Mo. 577; *Taylor v. Boyd*, 3 Ohio, 337; 17 Am. Dec. 603; *Guiteau v. Wisely*, 47 Ill. 433; *Wadhams v. Gay*, 73 Ill. 422; *McAnslan v. Pundt*, 1 Neb. 211. But this is denied in Alabama: *Marks v. Cowles*, 61 Ala. 299. But the rule that the reversal of a judgment does not affect a third person who becomes a purchaser, has no application when the purchaser is the judgment creditor himself: *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.

<sup>1</sup> *Grace v. Wade*, 45 Tex. 522. The earlier case of *Price v. Cole*, 35 Tex. 461, was overruled. See, also, *Catlin v. Bennatt*, 47 Tex. 165; *Grimes v. Hobson*, 46 Tex. 416; *Mainwarring v. Templeman*, 51 Tex. 205; *Wallace v. Campbell*, 54 Tex. 87; *Stevenson v. Texas Ry. Co.*, 105 U. S. 703. See in other States, *Sharp v. Shea*, 32 N. J. Eq. 65; *Condit v. Wilson*, 36 N. J. Eq. 370; *Fash v. Ravesies*, 32 Ala. 451; *Smith v. Jordan*, 25 Ga. 687; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62.



quired by virtue of a sale under the judgment. But in the majority of the States, where the doctrine prevails that a judgment affects only the actual interest of the judgment debtor, and does not take priority over unrecorded conveyances, the judgment creditor is regarded as a mere volunteer. If he takes nothing by his lien, how can he acquire a better right by attempting to convert that lien into a title? The reason that an unrecorded deed is given the preference over the judgment lien, is that the judgment creditor is in no more unfavorable position than he was before he obtained his lien. This reason must apply with equal force when he takes a sheriff's deed, without advancing a new consideration. If, however, he bids for the property more than the amount of his judgment, and pays the excess to the judgment debtor, there can be no doubt, as we understand the law, that he would occupy the position of any other purchaser. In such a case, he does advance a new consideration on the faith of the purchase and should accordingly be regarded as a *bona fide* purchaser. Nor would it, in our opinion, make any difference how small the amount was over the judgment. If the judgment debtor received any new consideration whatever from the judgment creditor, this would make the latter a purchaser for value, and entitle him to all the rights and benefits due to a person holding that relation.

**§ 643. Mortgage for purchase money.**—If a mortgage is executed at the time the land is purchased, to secure the payment of the consideration for which the land was sold, such mortgage is entitled to preference over judgments and other debts of the mortgagor, so far as the land thus purchased and mortgaged is concerned.<sup>1</sup> But in

<sup>1</sup> *Clark v. Munroe*, 14 Mass. 351; *Bunting v. Jones*, 78 N. C. 242; *Phelps v. Fockler*, 61 Iowa, 340; *Laidley v. Aiken*, 80 Iowa, 112; 20 Am. St. Rep. 408; *Curtis v. Root*, 20 Ill. 53; *Roane v. Baker*, 120 Ill. 308; *Cowardin v. Anderson*, 78 Va. 88; *Clark v. Butler*, 32 N. J. Eq. 644; *Stewart v. Smith*, 36 Minn. 82; 1 Am. St. Rep. 651; *Bolles v. Carli*, 12 Minn. 113; *Grant v. Dodge*, 43 Me. 489; *Guy v. Carriere*, 5 Cal. 511.



order that a mortgage may be entitled to this character of a purchase money mortgage it must be executed at the same time as the deed from the grantor. The preference is lost by allowing an interval of time to elapse between the two transactions, during which the interest of the purchaser is subject to be levied upon.<sup>1</sup> A mortgage of this character is good against the wife of the mortgagor, even if she is not a party to it.<sup>2</sup> "Courts, indeed, have gone so far as to hold that where a purchaser takes a deed of land, and at the same time executes a mortgage to a third person to secure money used in payment for the land, the mortgage and deed may be regarded as constituting one transaction, and the mortgage will be paramount to the dower right of the wife of the purchaser, although she does not sign the mortgage."<sup>3</sup> As the instruments derive their effect from delivery, it is sufficient if they are delivered at the same time, and the fact that they were executed at different times is immaterial.<sup>4</sup> A mortgage for purchase money is preferred to a homestead exemption.<sup>5</sup> If the conveyance reserves an annual rent, and con-

<sup>1</sup> *Heuisler v. Nickum*, 38 Md. 270; *Ahern v. White*, 39 Md. 409; *Foster's Appeal*, 3 Pa. St. 79.

<sup>2</sup> *Thomas v. Hanson*, 44 Iowa, 651; *Walters v. Walters*, 73 Ind. 425; *Birnie v. Main*, 29 Ark. 591; *Hinds v. Ballou*, 44 N. H. 619; *Stow v. Tift*, 15 Johns. 458; 8 Am. Dec. 266; *Thompson v. Lyman*, 28 Wis. 266; *Mills v. Van Voorhies*, 20 N. Y. 412.

<sup>3</sup> *Thomas v. Hanson*, 44 Iowa, 651, 653, per Adams, J., citing *Clark v. Munroe*, 14 Mass. 351; *Hazelton v. Lesure*, 9 Allen, 24; *King v. Stetson*, 11 Allen, 407. See, also, *Eslava v. Lepetre*, 21 Ala. 504; 56 Am. Dec. 266; *Bell v. The Mayor of New York*, 10 Paige, 49; *McGowan v. Smith*, 44 Barb. 232; *Billingsley v. Neblett*, 56 Miss. 537; *Jones v. Parker*, 51 Wis. 218; *Kaiser v. Lembeck*, 55 Iowa, 244; 7 N. W. Rep. 519; *Kettle v. Van Dyck*, 1 Sand. Oh. 76; *Young v. Tarbell*, 37 Me. 509.

<sup>4</sup> *Banning v. Edes*, 6 Minn. 402; *Mayburry v. Brien*, 15 Peters, 21; *Oake's Appeal*, 23 Pa. St. 186; 62 Am. Dec. 328; *Summers v. Darne*, 31 Gratt. 791; *Stewart v. Smith*, 36 Minn. 82.

<sup>5</sup> *Kimble v. Esworthy*, 6 Bradw. (Ill.) 517; *Middlebrooks v. Warren*, 59 Ga. 230; *Guinn v. Spurgin*, 1 Lea (Tenn.), 228. See *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740; *Allen v. Hawley*, 66 Ill. 164; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Lane v. Collier*, 46 Ga. 580; *Amphlett v. Hibbard*, 29 Mich. 298; *Magee v. Magee*, 51 Ill. 500; 99 Am. Dec. 571; *Nichols v. Overacker*, 16 Kan. 54. And see, also.

tains a condition that the grantor may enter and take possession for failure to pay the rent reserved, the transaction partakes so much of the character of a mortgage for the purchase money that the grantee has no power to create an encumbrance superior to the right of the grantor.<sup>1</sup> But a mortgage for purchase money to have this preference must be taken immediately. It is subordinate to a prior mortgage taken for value and without notice.<sup>2</sup> A mortgage of this character has precedence over a lien for labor and materials supplied to the purchaser.<sup>3</sup> While such a mortgage bars a wife of her right of dower,<sup>4</sup> yet she is not barred by the fact that the mortgage recites it to be a mortgage for the purchase money, when, by reason of the lapse of time between the deed and the mortgage, it is not.<sup>5</sup> But where the mortgage for the purchase money is not recorded, a deed from the grantor to a third party will not prevail against a subsequent recorded deed from the grantee to a party having no notice of the mortgage or the grantor's second deed.<sup>6</sup>

**§ 643 a. Third person advancing money.**—A mortgage made to a third person who advances the money

*Greeno v. Barnard*, 18 Kan. 518; *Pratt v. Topeka Bank*, 12 Kan. 570; *Hopper v. Parkinson*, 5 Nev. 233; *Hand v. Savannah etc. R. R.*, 12 S. C. 314.

<sup>1</sup> *Stephenson v. Haines*, 16 Ohio St. 478.

<sup>2</sup> *Houston v. Houston*, 67 Ind. 273. Priority is given to a mortgage for purchase money recorded with the deed of purchase over a mortgage made by the purchaser, before the completion of the purchase to secure a loan to be used for making the cash payment, even if this prior mortgage was recorded before the purchase money mortgage to the grantor was recorded: *Turk v. Funk*, 68 Mo. 18; 30 Am. Rep. 771; *City Nat. Bank's Appeal*, 91 Pa. St. 163.

<sup>3</sup> *Guy v. Carriere*, 5 Cal. 511; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Lamb v. Cannon*, 38 N. J. L. 362; *Macintosh v. Thurston*, 25 N. J. Eq. 369; *Virgin v. Brubaker*, 4 Nev. 31. See, also, *Rees v. Ludington*, 13 Wis. 276; 80 Am. Dec. 741. But see *Tanner v. Bell*, 61 Ga. 584.

<sup>4</sup> *Jones v. Parker*, 51 Wis. 218; *George v. Cooper*, 15 W. Va. 666.

<sup>5</sup> *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465. A deed of trust is considered to be a mortgage: *Summers v. Darne*, 31 Gratt. 791; *Curtis v. Root*, 20 Ill. 53; *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254.

<sup>6</sup> *Thompson v. Westbrook*, 56 Tex. 265.

is treated as a purchase money mortgage, and the holder of it is entitled to the same rights as if the mortgage had been executed to the grantor.<sup>1</sup> Where a son negotiates with his father for the purchase of the latter's land, and with a third person for a loan of money to enable him to make the purchase, and the father executes a deed to the son receiving the money from the stranger to whom the son and wife execute a mortgage to secure repayment of the purchase money, all the acts being contemporaneous and parts of one transaction, the mortgage must be considered in equity as a purchase money mortgage, and, even if it had not been signed by the son's wife, will not be subject to a homestead right or right of dower.<sup>2</sup> When the money is thus advanced by a third person, who takes a mortgage to secure his advances as a part of the same transaction, the lien of the mortgage is superior to that of a prior judgment obtained against the purchaser.<sup>3</sup> A married man bought a lot of land, and to secure the payment of the purchase money executed a mortgage to the vendor, who subsequently obtained a decree of foreclosure. Immediately before the sale was to occur the vendee borrowed of a third person sufficient money to discharge the mortgage and decree, and agreed to give him a mortgage on the lot to secure the money advanced. The latter paid off the decree, and the vendor's mortgage was satisfied; and shortly afterward the vendee complied with this agreement by executing to him a mortgage, but

<sup>1</sup> *Pearl v. Hervey*, 70 Mo. 160; *Kaiser v. Lembeck*, 55 Iowa, 244; *Laidley v. Aikin*, 80 Iowa, 112; 20 Am. St. Rep. 408; *Mize v. Barnes*, 78 Ky. 506; *Dillon v. Byrne*, 5 Cal. 455; *Lassen v. Vance*, 8 Cal. 271; 68 Am. Dec. 322; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740; *Curtis v. Root*, 20 Ill. 53; *Jones v. Parker*, 51 Wis. 218; *Carey v. Boyle*, 53 Wis. 574; *Jackson v. Austin*, 15 Johns. 477; *Dwenger v. Branigan*, 95 Ind. 221; *Adams v. Hill*, 29 N. H. 202; *Moring v. Dickenson*, 85 N. C. 466. See, also, *Butler v. Thornburg*, 131 Ind. 277; 31 Am. St. Rep. 433; *Stewart v. Smith*, 36 Minn. 82; 1 Am. St. Rep. 651; *Bradley v. Bryan*, 43 N. J. Eq. 396; *Cowardin v. Anderson*, 78 Va. 88; *Rogers v. Tucker*, 94 Mo. 346.

<sup>2</sup> *Jones v. Parker*, 51 Wis. 218.

<sup>3</sup> *Laidley v. Aiken*, 80 Iowa, 112; 20 Am. St. Rep. 408; *Jackson v. Austin*, 15 Johns. 477; *Stewart v. Smith*, 36 Minn. 82; 1 Am. St. Rep. 651.

the vendee's wife did not join in the mortgage, although, at the time such third person advanced the money, the premises were occupied by the vendee and his wife as a homestead. Not long afterward the vendee died, and the wife claimed the property as a homestead, but the court held the mortgage of the person advancing the money took the place of the vendor's mortgage, and consequently became a valid lien on the premises to the extent that the money was applied to the satisfaction of the original vendor's mortgage.<sup>1</sup>

**§ 643 b. Execution at same time not essential.**—It is not necessary that the deed and mortgage should be executed at the same time, or even on the same day, that they may be considered as contemporaneous, if they form parts of one continuous transaction and are so intended. For the purpose of effectuating the intent of the parties the two instruments will be treated as contemporaneous.<sup>2</sup> Thus, where a mortgage was made three days later than the deed, it was considered, for the purpose of enabling the person advancing the money to occupy the position of a purchase money mortgagor, to have been contemporaneous with the deed.<sup>3</sup> A purchaser executed a note in part payment of the purchase price, which was afterward transferred to another, who shortly after the transfer, loaned the purchaser an additional sum, took a note and a new mortgage on the same lot, and the purchaser's interest in another lot, and caused the prior mortgage to be canceled and satisfied of record. When suit was brought to foreclose the mortgage, the purchaser's wife intervened and claimed the premises as a homestead, but

<sup>1</sup> Carr v. Caldwell, 10 Cal. 380; 70 Am. Dec. 740.

<sup>2</sup> Stewart v. Smith, 36 Minn. 82; 1 Am. St. Rep. 651. See, also, Banning v. Edes, 6 Minn. 402; Summers v. Darne, 31 Gratt. 791.

<sup>3</sup> Stewart v. Smith, 36 Minn. 82; 1 Am. St. Rep. 651. Said Mr. Justice Mitchell, speaking for the court: "The rule, as generally stated in the books, is, that to give a purchase money mortgage this precedence, it must have been executed simultaneously, or at the same time, with the deed of purchase. Some ground for a narrow and literal construc-

the court decided that the land was liable for the remainder of the purchase money regardless of the purpose to which it might be devoted, but allowed the mortgagee to make out of the lot claimed as a homestead only the actual amount of the purchase money and interest remaining due, holding that for the excess over such purchase money, he must proceed on his other security, or against the party, but not against the homestead.<sup>1</sup> Where a man who is married occupies property as a tenant, and concludes to purchase, borrowing the whole of the purchase money from another and mortgaging the premises to him to secure the payment of the sum borrowed, although his wife may not sign the mortgage, still the home-

tion of this language is furnished by the fact that the reason usually assigned for the doctrine is the technical one of the mere transitory reversion of the mortgagor, rather than the superior equity which the mortgagee has to be paid the purchase money of the land before it shall be subjected to other claims against the purchaser. But it is evident, both upon principle and authority, that what is meant by this statement of the rule is not that the two acts—the execution of the deed of purchase, and the execution of the mortgage—should be literally simultaneous. This would be almost an impossibility. Some lapse of time must necessarily intervene between the two acts. An examination of the cases will show that the real test is not whether the deed and mortgage were in fact executed at the same instant, or even on the same day, but whether they were parts of one continuous transaction, and so intended to be, so that the two should be given contemporaneous operation in order to promote the intent of the parties: 1 Washburn on Real Property, \*178; Wheatley v. Calhoun, 12 Leigh, 264; 37 Am. Dec. 654; Love v. Jones, 4 Watts, 466; Snyder's Appeal, 91 Pa. St. 477. Hence, it will be found that in some of the cases the fact that the mortgage was executed pursuant to an agreement made prior to the execution of the deed of purchase has been the controlling consideration upon which the mortgage has been given precedence, although not in fact until some time after the execution of the deed. The reason is, that such a state of facts would show that both acts were but parts of the same continuous transaction. As evidence of the fact, such previous agreement would have equal probative force, although it might not be enforceable, because not in writing and within the statute of frauds. Even if such agreement while executory was not enforceable, yet when once executed by the execution of the mortgage, it becomes as effectual as if originally in writing, and in equity will be deemed [if the rights of no innocent purchaser have intervened] as taking effect by relation as of the date of the agreement."

<sup>1</sup> Dillon v. Byrne, 5 Cal. 455.

stead is subject to the mortgage, as the deed and mortgage are to be considered as parts of the same transaction.<sup>1</sup>

**§ 644. Administrator's sale and prior unrecorded conveyance.**—An unrecorded deed or mortgage binds the mortgagor and his administrator.<sup>2</sup> The administrator is a trustee, and succeeds to such rights as the intestate possessed, and no other. An interesting case in which this principle was applied occurred in Indiana. An intestate executed a mortgage on certain real estate to secure the purchase money. This mortgage was not recorded, and the administrator, having no knowledge of its existence, sold the land under an order of court, for the purpose of producing assets to meet claims against the estate, the estate being insolvent. The purchaser at this sale was also ignorant of this mortgage, paid the whole of the purchase money, which was a full and fair price for the property, and took a proper conveyance. The question presented to the court for decision was whether the mortgagee, whose mortgage was not recorded, was entitled to payment out of the proceeds of the real estate in preference to general creditors. The court held that the proceeds of the sale were subject to the mortgagee's lien, and that he was entitled to such preference.<sup>3</sup> The court discussed the question in its various aspects at considerable length. "It is only subsequent purchasers and encumbrancers in good faith who are protected against an unrecorded mortgage. As against all the world besides, the registry imparts no virtue or force whatever to the instrument. As against the mortgagor, and the estate while it remains in his hands, the lien is as perfect without registry as it is with it. It is so, also, against his general creditors, while he lives, and after his death. No change was wrought in the rights of the mortgagee with respect to the other creditors by his decease. The administrator was his personal representa-

<sup>1</sup> *Lassen v. Vance*, 8 Cal. 271.

<sup>2</sup> *Andrews v. Burns*, 11 Ala. 691.

<sup>3</sup> *Kirkpatrick v. Caldwell*, 32 Ind. 299.

tive, and, of course, took no better right than the intestate had. Indeed, he took no estate whatever in the lands mortgaged, but a duty with reference thereto fell upon him in the performance of his trust, when it was discovered that its sale would be necessary to satisfy indebtedness. This was to file a petition for such sale, stating, amongst other things, the nature of the intestate's title. This implies some diligence to ascertain the precise fact. Mere ignorance is no excuse for him. It is his duty to know the truth; and, indeed, he is unfaithful to his trust if he fails to inform himself of the entire condition of the whole estate, unless, indeed, proper diligence fails to discover it. This record merely discloses his want of knowledge, and we are not able to perceive why that circumstance should in any manner influence the decision of the question before us. Why should general creditors derive an advantage from the administrator's ignorance of a fact? They have not acted upon it to their injury. If this ignorance was the result of his negligence in making inquiry, and shall profit one creditor at the expense of another, then the rights of creditors in the fund would depend much upon the care and attention which the administrator brings to the performance of his duties; and we suppose this cannot be. We are of the opinion that the fact that the administrator did not know of the existence of the mortgage may be laid out of the case as an element wholly immaterial." "It certainly cannot be of avail to the general creditors that they had no notice of the mortgage. They are not in a position to avail themselves of such want of notice, not being purchasers or encumbrancers." To the argument that, if the mortgagor had sold the land to an innocent purchaser and received the purchase money during his lifetime, the mortgagee would not be permitted to pursue the fund in his hands, but must have rested content with the result of his remedy at law *in personam*, and hence, as a logical result, could not follow the proceeds in the hands of the administrator, the court replied: "The argument has ap-



parent force, and, indeed, would be convincing if the administrator held the fund as the mortgagor would hold it in the case supposed. In the absence of fraud, the latter would hold it in his own right, but the administrator holds it as a mere trustee, to be disposed of under the control of the court, in the payment of debts, and any surplus by distribution. If the existence of the mortgage had been stated in the petition for the sale of the land, as it should have been, if known, the court would have ordered the sale subject to the mortgage, or else for the payment thereof, as might have been adjudged best. In the latter case, the administrator's duty would have required him to apply the proceeds of the sale, so far as necessary, to the payment of the mortgage debt; and the court would have enforced this duty. But in the present case the administrator, in applying for power to sell, did not inform the court of the mortgage, and consequently the decree made no provision for it, and the purchaser, being without notice, took title free from the mortgage, paying a corresponding price. The money is in the hands of the administrator, and no equities have intervened in behalf of other creditors. There is no reason, therefore, why the court should not, for the purposes of justice, follow the proceeds, still in reach, and subject them to the lien which originally subsisted against the land, as is habitually done in other cases of trusts, where the trustee has either willfully or ignorantly violated his duty by disposing of the trust estate."<sup>1</sup>

**§ 645. Compliance with preliminary requirements.—**To entitle a deed to be recorded, all preliminary requirements must be complied with. It must be properly executed and acknowledged. If the deed is defective in any of these particulars, the rule is firmly established, that spreading it upon the record does not give constructive

<sup>1</sup> *Kirkpatrick v. Caldwell*, *supra*, per *Frazer*, C. J. And see *Stewart v. Mathews*, 19 Fla. 752.

notice of its contents.<sup>1</sup> "Without an acknowledgment, the recording of the deed could have no effect as to notice, for the statute requires the deed to be executed and acknowledged and then recorded, to operate as constructive notice. . . . And if this acknowledgment be defective in not showing that the person who took the acknowledgment had a right to take it, the act does not appear to be official, and is not a compliance with the statute. And where a purchaser is to be charged with constructive notice from the mere registration of a deed, all the substantial requisites of the law should be complied with. As well might it be contended that a recorded deed without an acknowledgment would be notice, as that it would be notice with a defective acknowledgment."<sup>2</sup> An instrument

<sup>1</sup> *Pope v. Henry*, 24 Vt. 560; *Stevens v. Hampton*, 46 Mo. 408; *Galt v. Dibrell*, 10 Yerg. 146; *Lewis v. Baird*, 3 McLean, 56; *McMinn v. O'Connor*, 27 Cal. 238; *Holliday v. Cromwell*, 26 Tex. 188; *Ohouteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460; *Whitehead v. Foley*, 28 Tex. 268; *Walker v. Gilbert*, 1 Freem. Ch. 85; *Blood v. Blood*, 23 Pick. 80; *Hernon v. Kimball*, 7 Ga. 432; 50 Am. Dec. 406; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Suiter v. Turner*, 10 Iowa, 517; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Brinton v. Seevers*, 12 Iowa, 389; *Mummy v. Johnson*, 3 Marsh. A. K. 220; *Schults v. Moore*, 1 McLean, 523; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436; *Brown v. Lunt*, 37 Me. 423; *Edwards v. Brinker*, 9 Dana, 69; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Johns v. Reardon*, 3 Md. Ch. 57; *De Witt v. Moulton*, 17 Me. 418; *Stevens v. Morse*, 47 N. H. 532; *Harper v. Reno*, 1 Freem. Ch. 323; *Graham v. Samuel*, 1 Dana, 166; *Barney v. Little*, 15 Iowa, 527; *Cockey v. Milne*, 16 Md. 200; *White v. Denman*, 1 Ohio St. 110; *Hodgson v. Butts*, 8 Cranch, 140; *Sumner v. Rhodes*, 14 Conn. 135; *Carter v. Champion*, 8 Conn. 549; 21 Am. Dec. 695; *Work v. Harper*, 24 Miss. 517; *Thomas v. Grand etc. Bank*, 9 Smedes & M. 201; *Strong v. Smith*, 3 McLean, 362; *Green v. Drinker*, 7 Watts & S. 440; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Heister v. Fortner*, 2 Binn. 40; 4 Am. Dec. 417. See, also, *Kerns v. Swope*, 2 Watts, 75; *Graves v. Graves*, 6 Gray, 391; *Shaw v. Poor*, 6 Pick. 88; 17 Am. Dec. 347; *Harper v. Barsh*, 10 Rich. Eq. 149; *Cheney v. Watkins*, 1 Har. & J. 527; 2 Am. Dec. 530; *Tillman v. Cowand*, 12 Smedes & M. 262; *Burnham v. Chandler*, 15 Tex. 441; *Bossard v. White*, 9 Rich. Eq. 483; *Brydon v. Campbell*, 40 Md. 331; *Bass v. Estill*, 50 Miss. 300; *Fleming v. Ervin*, 6 W. Va. 215; *Dussaume v. Burnett*, 5 Iowa, 95; *McKean v. Mitchell*, 35 Pa. St. 269; 78 Am. Dec. 835; *Galpin v. Abbott*, 6 Mich. 17.

<sup>2</sup> *Schults v. Moore*, 1 McLean, 520, 527; *Wood v. Cochrane*, 39 Vt. 544; *Jones v. Berkshire*, 15 Iowa, 248; 83 Am. Dec. 412; *Todd v. Outlaw*, 79 N. C. 235. And see *McMinn v. O'Connor*, 27 Cal. 238. See *Masterson*

is not entitled to record when it purports to have been signed and acknowledged by a firm, and in a firm name. It must appear by which member of the firm this was done.<sup>1</sup> Where a deed of a corporation is duly sealed, and is in all respects properly recorded, except that the record fails to show a copy of the seal, or any device representing it, such record is valid and sufficient to operate as notice, if it represents on its face, in any other way, that the deed was in fact sealed.<sup>2</sup>

*v. Todd*, 6 Tex. Civ. App. 131; 24 S. W. Rep. 682. Where an agreement is made between a landowner and a water company, creating a lien on land for water supplied, the acknowledgment of the agreement by the landowner entitles it to record, and its registration imparts notice to subsequent purchasers under him of the lien: *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114; 13 Am. St. Rep. 112. And see *Spect v. Gregg*, 51 Cal. 198. Where it is necessary that a conveyance should be sealed, an instrument to which a seal is not affixed is not entitled to be recorded: *Racouillat v. Sansevain*, 32 Cal. 376; *Racouillat v. Rene*, 32 Cal. 450. In the latter case, Sawyer, J., said: "The instrument of April 13, 1851, is not under seal, and whether properly acknowledged in other respects or not, was not entitled to record under the act concerning conveyances as it stood at the date of the instrument. The record, therefore, did not impart constructive notice of its contents to anybody; and unless Rene had actual notice of the contract embraced in the instrument, he was not affected by it." But see *Wallace v. Moody*, 26 Cal. 387. If the instrument, however, was sealed in a proper manner when it was executed, it is not invalidated by a subsequent loss of the seal, unless the seal was removed before it was presented for registration, and the party who attempts to invalidate the instrument has the burden of proof: *Van Riswick v. Goodhue*, 50 Md. 57. If the statute requires a conveyance to be attested by two witnesses to entitle it to registration, and a conveyance is thus witnessed, but is recorded by mistake without copying the attestation, the record, as it is, is not constructive notice: *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Frostburg v. Brace*, 51 Md. 508; *Potter v. Strausky*, 48 Wis. 235; *Gardner v. Moore*, 51 Ga. 268; *Hastings v. Cutler*, 24 N. H. 481; *Morrill v. Morrill*, 60 Vt. 74; 6 Am. St. Rep. 93; *Carler v. Champion*, 8 Conn. 549; 21 Am. Dec. 695. A record of a mortgage is notice to subsequent purchasers in favor of a person who holds an assignment of the mortgage duly recorded, if the acknowledgment is in proper form and the defect is not apparent, as where the officer who took it acted out of his jurisdiction: *Heilbrun v. Hammond*, 18 Hun, 474.

<sup>1</sup> *Sloan v. Owens etc. Machine Co.*, 70 Mo. 206. The seal of the officer taking the acknowledgment is essential to its due registration: *Masterson v. Todd*, 6 Tex. Civ. Ap. 131.

<sup>2</sup> *Heath v. Big Falls Cotton Mills*, 115 N. C. 202.

§ 646. **Illustrations — Attesting witnesses.** — This principle is most often applied in the case of defective acknowledgments. But all other requirements of the statute antecedent to registration must be complied with to make the record notice. If, for instance, a mortgage with only one subscribing witness is, by the provisions of a statute, void as a legal mortgage, the registration of such an instrument will not raise the presumption of notice to a purchaser from the mortgagor.<sup>1</sup> In Connecticut the same question was similarly decided. The court carefully considered the question, and held that the registration of a deed, defective in having but one legal witness, was not constructive notice of such conveyance. The considerations by which the court was governed in arriving at this conclusion are fully stated in the portion of the opinion quoted in the note.<sup>2</sup>

<sup>1</sup> *Harper v. Barsh*, 10 Rich. Eq. 149; *Thompson v. Morgan*, 6 Minn. 292; *White v. Denman*, 16 Ohio, 59; *Van Thorniley v. Peters*, 26 Ohio, St. 471; *Hodgson v. Butts*, 1 Oranch, 488; *New York Life Ins. etc. Co. v. Staats*, 21 Barb. 570; *Frostburg Mut. Building Assn. v. Brace*, 51 Md. 508; *Gardner v. Moore*, 51 Ga. 268; *Van Riswick v. Goodhue*, 50 Md. 57; *Ross v. Worthington*, 11 Minn. 438; 88 Am. Dec. 95; *Van Thorniley v. Peters*, 26 Ohio St. 471; *White v. Magarahan*, 87 Ga. 217; *Potter v. Stransky*, 48 Wis. 235; *Morrill v. Morrill*, 53 Vt. 74; 38 Am. Rep. 659.

<sup>2</sup> *Carter v. Champion*, 8 Conn. 549; 21 Am. Dec. 695. Said Williams, J: "The question then comes to this: Is the registering of a defective deed constructive notice so as to bind third persons? Here it is to be remarked, that the registering of a deed is a legislative regulation, founded indeed upon the best principles of policy for the security of titles, but still depending for its effect upon the true construction of the statute. Our statute has prescribed the manner in which deeds of land shall be executed; that they shall be attested by two witnesses, acknowledged before a magistrate, and, to make them effectual against third persons, shall be recorded. The deed to be recorded, then, is the deed spoken of in the statute; that is, a deed executed according to the statute, not the instrument merely which the common law would denominate a deed, but the instrument which has the statute requisites to give it validity as a deed; because no other instruments are recognized as grants and deeds of 'houses and lands,' the statute being express that no grant or deed of land shall be valid unless written, subscribed, witnessed, and acknowledged, as aforesaid. In one case only, a provision is made for a deed not completed according to the requisites of the statute; and that is where the grantor refuses to make an acknowledgment. Then, in conformity to a similar provision in the civil law, the grantee

**§ 646 a. Statutes requiring payment of taxes prior to registration.**—In some States it is provided by statute that a deed cannot be recorded unless it appears by a proper certificate that the taxes charged upon the land have been paid, and that no outstanding tax liens or titles exist. These statutes have been attacked as being unconstitutional, for attempting to interfere with the acquisition and disposition of property, and as taking property without due process of law. On this question there is a divergence of opinion. The views of one court are thus

may leave a copy of his deed, with a claim of title, with the register, which secures his title until a legal trial has been had. This exception shows that in all other cases, the deeds completed in the manner required by statute were intended. That this is not a deed of that character, the whole object of the bill shows. Is the recording, then, of such an instrument of any effect? It may, indeed, be evidence tending to prove *actual* notice; but when the fact of actual notice is negated, as it is in this case, can the record have any effect upon third persons? Now, if this be a rule of policy, adopted by the legislature, the court is not to extend it to the cases not within its provisions, and should it be extended to the case on trial, I know not where we are to stop, or what line to draw. If it be said that no prudent man will stop without looking at the record, that may be said as truly in any other case as in this, and would be equally applicable to any other defect. But, in point of fact, we know purchases are often made, where from the distance of the record, or a reliance upon the integrity of the grantor, no such examination is made, and although this is no excuse for a party, where his case is within the act, yet it may have been the reason why the legislature did not extend the provisions of the act to cases of this kind. But whatever may have been their reasons, it is sufficient for me that they have not done so."

Where an instrument is required to be acknowledged before two justices of the peace, the record of an instrument acknowledged before one justice only is not notice: *Dufphey v. Frenaye*, 5 Stewt. & P. 215. The record of a conveyance of a married woman is not notice when the acknowledgment is not taken separate and apart from her husband: *Armstrong v. Ross*, 20 N. J. Eq. 109. If a statute requires that a certificate of the official character of the officer shall accompany the certificate of acknowledgment, this must be done to make the record notice; but the certificate may be obtained afterward, and if properly recorded the conveyance is considered as recorded from the time at which this certificate is filed: *Reasoner v. Edmundson*, 5 Ind. 393; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436. An instrument is not entitled to registration where the certificate of acknowledgment designates the persons who make the acknowledgment as "grantors of the within indenture," omitting the statement that they are known to the officer to be the persons who executed the conveyance: *Fryer v. Rockefeller*, 63 N. Y. 268.

expressed: "If the law provided a means by which the validity of the tax could be determined before payment, and protected the party meanwhile by providing for a temporary receipt of the deed, or otherwise, it probably could be sustained as constitutional, even though it should put the burden of proving the illegality of the tax upon the grantee, which, however, would look like an unnecessary hardship, when we consider the power possessed by the State to enforce the collection of its revenues. In the case of small illegal charges, the act in question practically inaugurates a system of petty robbery by the State, for the costs of a suit to recover small sums paid would prevent parties from bringing them. It is not a taking by due process of law, and it conflicts in a measure with the constitutional provision declaring that private property shall not be taken for public purposes without just compensation having been first made or paid into court for the owner. The act is rather judicial than legislative in character. It, in effect, declares or adjudges all taxes shown by the records as a charge upon real estate to be lawful, or it practically authorizes the State to compel payment of illegal demands. The constitutional provision declaring that no person shall be deprived of life, liberty, or property without due process of law, is not limited to judicial proceedings, but extends to every proceeding which may interfere with those rights, whether judicial, administrative, or executive."<sup>1</sup>

**§ 646 b. Such statutes held to be constitutional.**—On the other hand, similar statutes have been held to be constitutional on the ground that the legislature has power to provide for the manner of transferring title to real estate, and for the registration of conveyances. The statute, it is said, may provide what instruments shall be recorded, and how they shall be executed and authenticated so as to entitle them to registration, and may prescribe any other rule, regulation, or condition of a legislative character that may

<sup>1</sup> State ex rel. Baldwin v. Moore, 7 Wash. 173; 34 Pac. Rep. 461.



be deemed wise.<sup>1</sup> In Michigan, where a statute of similar import exists, it was contended that the law was void, because, among other reasons, it was an unwarrantable infringement of property rights. But the court, per Mr. Justice Grant, said it thought otherwise, and continued: "Mere inconvenience, however great, is not sufficient to defeat a law. That is a consideration for the legislature, and not for the court. The State may enact stringent measures to enforce the collection of the public revenue. The law provides ample remedies for the property owner to contest the validity of the tax assessed against him. He may pay the tax under protest, and at once bring suit to recover it back. He may appear in court when the State brings suit to foreclose its lien, and there contest its validity. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the legislature, and the court cannot declare them void because they are harsh. Besides, the recording of the deed is not necessary to pass title. The registry law is only designed to record and preserve evidence of title. Title passes upon the execution of the deed, and possession under it is notice to all of the rights of the grantee in possession."<sup>2</sup>

<sup>1</sup> *State v. Register of Deeds of Ramsey Co.*, 26 Minn. 521; 6 N. W. Rep. 337. The statute referred to in this case provided, "When any deed, plat of any townsite, or instrument affecting the same, or any other conveyance of real estate, is presented to the county auditor for transfer, he shall ascertain from the books and records in his office if there be delinquent taxes due upon the land described therein, or if it has been sold for taxes; and if there are delinquent taxes due, he shall certify to the same; and upon the payment of such delinquent or other taxes that may be in the hands of the county treasurer for collection, he shall transfer the same, and note upon every deed of real property so transferred, over his official signature, 'taxes paid and transfer entered'; or if the land described has been sold or assigned to an actual purchaser for taxes, 'paid by sale of land described within'; and, unless such statement is made upon such deed or other instrument, the register of deeds shall refuse to receive or record the same. A violation of the provisions of this section by the register of deeds shall be deemed a misdemeanor, and, upon conviction thereof, he shall be punished by a fine of not less than one hundred dollars, nor exceeding one thousand dollars."

<sup>2</sup> *Van Huse v. Heames*, 96 Mich. 504; 56 N. W. Rep. 22.



§ 646 c. **Comments.**—We have gone into this matter somewhat fully because the tendency of modern legislation is to provide methods for speedily enforcing the payment of taxes, and to abolish, so far as statutes can effect the object, the strict rules by which every step in a tax proceeding was formerly measured. Statutes requiring all taxes to be paid before any instrument affecting real estate shall be recorded, seems to supply an easy and efficacious way of forcing the payment of taxes. Whatever may be said against the policy of such legislation on the ground that it compels the payment of taxes, although they may be invalid, and leaves the person paying to the doubtful remedy of recovering the money in a suit,<sup>1</sup> still, in our mind, these are not just objections to their constitutionality. The right to have a deed recorded is purely one of statutory origin. For the purpose of providing a uniform and convenient method of giving notice of claims to real estate, where actual notice does not exist, the State has provided a means for registering instruments affecting the title to land. The State has made the observance of certain preliminary requirements essential to the complete effect of the record. It prescribes that the instrument shall be acknowledged, and in what manner. It may prescribe that the deed shall be attested by witnesses, shall be subject to a stamp tax, and may likewise prescribe any other condition. If a person does not wish to record a deed, it cannot be said that he has lost any constitutional privilege. His title is in no manner affected. The title passes by the execution and delivery of the conveyance, and if he assumes possession, his rights are complete. If he desires to avail himself of certain statutory privileges, by which he may be enabled to give constructive notice of his interest, he is not deprived of this right, but must exercise it on compliance with the conditions prescribed. The State is under no obligation to provide a registry law at all. It is true that in every State in the Union registry laws are in force, but this is only because

<sup>1</sup> See §§ 1349–1351, *post*.

public convenience has found them necessary. But so far as any principle of constitutional law is involved, all these laws might be repealed. If they can be absolutely repealed, the State certainly has power to modify them by determining what instruments shall be recorded, and by declaring the conditions which those wishing to obtain the benefit of the registry laws must observe. If one of these conditions be the payment of all taxes antecedently levied, the State, in our judgment, has power to prescribe it, and such a provision, on this ground, cannot be held to be unconstitutional.

**§ 647. Attachment at time of acknowledgment.**—A deed was acknowledged before a register of deeds, and given to him to be recorded. At the same instant, the real estate described in the deed was attached by a creditor of the grantor. On the ground that the deed could not be recorded without a certificate of the acknowledgment, and it must have required some time to write out the certificate, the attachment was held to have priority over the deed.<sup>1</sup> The court said: "It was not in a state to be considered as recorded until after the attachment was made. It should not only be acknowledged, but the certificate of acknowledgment should be completed before the delivery to the register, in order that such delivery shall constitute a record. The certificate of acknowledgment is to be a part of the record. It is not sufficient that the register is informed of the acknowledgment; the object of recording is to give notice to others. Until this certificate was affixed, the fact that the deed was acknowledged, and in the register's hands, could not be noticed."<sup>2</sup>

<sup>1</sup> *Sigourney v. Larned*, 10 Pick. 72.

<sup>2</sup> *Sigourney v. Larned*, *supra*. Continuing, the court said: "By the statute (Stats. 1783, c. 37, § 4), a deed, to have effect against any but the grantor and his heirs, and to entitle it to be recorded, must be acknowledged by such grantor before a justice of the peace. Here Mr. Ward acted in the double capacity of justice of the peace and register of deeds. He could not consider the deed as in his official custody in the latter capacity, until he had done his office in taking the acknowledgment of the grantor

§ 648. **Incapacity to take acknowledgment.**—Under the statute in Missouri, a justice of the peace in one county has no power to take and certify the acknowledgment of an instrument conveying lands in another county. If an acknowledgment is taken by such an officer under these conditions, the acknowledgment is a nullity, and the deed imparts no notice, although it may have been recorded.<sup>1</sup> As has been explained in a previous section, a party in interest is disqualified from taking an acknowledgment. If, however, he does take the acknowledgment, and the instrument shows upon its face the fact that he is interested, its registration is improper, and does not impart notice. But it is held that, when the instrument upon its face does not disclose this fact, it is the duty of the register to receive and record it. Under this state of facts, it will, notwithstanding there may be some hidden defect, operate as notice.<sup>2</sup>

§ 649. **Omission of name of grantee.**—A conveyance, although it has been recorded, in which the name of the grantee is omitted, is not constructive notice to subse-

in the former, which must necessarily take some time. The exact time when the certificate was made does not distinctly appear; but the probability is that it was not done till the next morning. But we do not decide the case upon that ground; had the magistrate proceeded instantly to write the certificate of acknowledgment, it must have taken some time during which the attachment took effect. Where, in a controverted question of property, the parties stand upon equal grounds in point of equity, the legal title shall prevail; and, in such cases, slight circumstances are sufficient to determine that priority upon which we think the preferable legal title depends. Here we think the attachment was prior in time, and the maxim, *prior in tempore, potior in jure*, must decide in favor of the attaching creditor."

<sup>1</sup> Bishop v. Schneider, 46 Mo. 472; 2 Am. Rep. 533.

<sup>2</sup> Stevens v. Hampton, 46 Mis. 404. A court of equity cannot correct a mistake in a certificate of acknowledgment, in which the grantee instead of the grantor appeared to be the person who made the acknowledgment, so as to make the record of the deed operative from the beginning. It is impossible in such a case to determine whether the mistake was committed in writing the wrong name in the certificate, or in taking the acknowledgment of the wrong person: Wood v. Cochrane, 39 Vt. 544.

quent purchasers. As an illustration of this rule, a case may be cited where the name of the mortgagee was left blank in a mortgage, and the court said, with reference to this defect: "The question in this case is not as to whether there might be an implied authority between the mortgagor and the mortgagee to fill up the blank and make the instrument complete. The question is, as to the effect of the record of the instrument in its imperfect condition, as constructive notice to a subsequent purchaser of the property. It has been frequently held that slight omissions in the acknowledgment of a deed destroy the effect of the record as constructive notice. *A fortiori*, it seems to us, should so important and vital an omission as that of the name of the grantee have that effect."<sup>1</sup>

**§ 650. Description of land.**—As the object of the registry acts is to enable purchasers to obtain accurate information respecting the title to any particular piece of land, it is essential to the accomplishment of this object that the description of the land in the conveyance should be reasonably certain and sufficient to enable subsequent purchasers to identify the premises intended to be conveyed.<sup>2</sup> In many cases the description is so inaccurate

<sup>1</sup> *Disque v. Wright*, 49 Iowa, 538, 540, per Day, J. The court cited the case of *Chauncey v. Arnold*, 24 N. Y. 330, as being in point. If a conveyance is recorded without the signature of the grantor, though it may, in fact, have been signed, and the omission to record it an error, yet the record in such a case is not constructive notice: *Shepherd v. Burkhalter*, 13 Ga. 443; 58 Am. Dec. 523. If the transposition of the name of the parties is apparent, as where the mortgagee's name is by mistake written in the blank for the mortgagor, and the latter's name in the blank for the mortgagee, but it is signed by the proper party, and purports to secure a debt from the party who signs to the other, and is properly acknowledged by the person who signs it, subsequent purchasers from the mortgagor by its record are charged with notice of the mistake: *Beaver v. Slanker*, 94 Ill. 175. The record of a conveyance is a nullity, where the certificate of acknowledgment fails to state that the officer is personally acquainted with the party acknowledging, if such a statement is required by statute: *Kelsey v. Dunlap*, 7 Cal. 160; *Peyton v. Peacock*, 1 Humph. 135. See, also, *Thurman v. Cameron*, 24 Wend. 87; *Johnson v. Walton*, 1 Sneed, 258.

<sup>2</sup> *Rodgers v. Kavanaugh*, 24 Ill. 583; *Port v. Embree*, 54 Iowa, 14; *Barrows v. Baughman*, 9 Mich. 213; *Eggleston v. Watson*, 53 Miss. 339;

or misleading that courts have no hesitancy in declaring it insufficient to charge purchasers with constructive notice. In others, while the description is erroneous, yet it may be expressed in such a manner, or may be connected with such attendant circumstances, that a purchaser is deemed to be put upon inquiry, and, if he fails to prosecute this inquiry, he is chargeable with all the notice he might have obtained had he done so. We call attention in the following sections to instances in which these principles have been applied.

**§ 651. Illustrations of description insufficient to give constructive notice.**—The description in a deed of land was: "Lying as follows, viz., beginning at a servisberry corner, thence north to white oak, thence east to white oak, thence south to limestone quarry, thence to a white oak; all these trees are marked for the purpose of running off the above-described land." The description omitted all reference to the township, county, or State in which the land was situated. The court conceded that this deed and an actual transfer of possession would pass a good title, but held that the record of it was not notice to a purchaser at a judicial sale, nor sufficient to put him upon inquiry.<sup>1</sup> A purchaser is not charged with con-

Wolfe v. Dyer, 95 Mo. 545; Holloway v. Platner, 20 Iowa, 121; 89 Am. Dec. 517; Nelson v. Wade, 31 Iowa, 49; Green v. Witherspoon, 37 La. Ann. 751; Wright v. Lancaster, 48 Tex. 250; Murphy v. Hendricks, 57 Ind. 593; Adams v. Edgerton, 48 Ark. 419.

<sup>1</sup> Banks v. Ammon, 27 Pa. St. (3 Casey), 172. The opinion of the court was delivered by Knox, J., who on this point said: "The rule of *caveat emptor* applies to a purchaser at a judicial sale, but he is not bound to see what is not to be seen. He is protected by the recording acts, and secret defects in a title apparently good, are for him no defects at all. Notice may be by record, by possession, or it may be given directly to the person sought to be charged with it, either by writing or verbally. In the case before us, at the time of the Orphan's Court sale, the possession was in the heirs at law of Joseph Hutchison, and there was no proof of actual notice to the purchaser that Andrew Banks held a life estate in the premises sold. Was the record of the deed of 14th August, 1832, notice of the estate of Banks? We think not. There is nothing in the description to bring home notice to the purchaser of the identity of the land. Neither township, county, nor State is given for its

structive notice of a mortgage, describing certain lots upon a town plat which had not been recorded, when the lots were described by different numbers in a plat recorded afterward, and the mortgagee was not in possession of the premises. A party is not put upon inquiry by the absence of a town plat from the record till after the date and record of a conveyance of lots contained in it, so as to charge him with a knowledge of the facts that it was possible for him to ascertain by continuing such inquiry.<sup>1</sup> Certain property should have been described as "lot one in block six." It was, however, by mistake, described in the deed as "lot and six," a part of the words of the correct description being omitted. A purchaser at a judicial sale, it was held, would take priority over a senior purchaser holding a deed in which the property was thus inaccurately described, unless at the time of his purchase he had such notice as would put a reasonably prudent man upon inquiry.<sup>2</sup> A conveyance of "all the estate, both real and personal," to which the grantor "is entitled in law or in equity, in possession, remainder, or reversion," is operative as a transfer of the grantor's whole estate. But it is held that the

locality; nor is the number of the tract or the amount of acres mentioned. No boundaries, courses, or distances referred to; all that is required to fill the description is to find one servisberry, three white oaks, a limestone quarry, with the trees marked in some manner. One about to purchase at a judicial sale, finding such a deed upon record, might safely assume that it did not apply to land of which the grantor died seised."

<sup>1</sup> *Stewart v. Huff*, 19 Iowa, 557. Said Cole, J: "The plaintiffs might have protected themselves perfectly, and secured a priority for their mortgage by causing the plat of Dyersville, then in existence, to be duly recorded. Without such recorded plat there was one link wanting in their chain of title upon the record. The only means of supplying this defect in their record title was to take possession of the property, or otherwise bring actual or constructive notice to the defendant, of the existence of the missing link. There is no finding of such fact, nor could the mortgage of certain lots in a town plat not upon record be construed into a notice of a claim upon other lots in a plat afterward made and recorded; nor can the absence from record of a town plat till after the date and record of a mortgage of lots therein, in any just or legal sense be held to put a party upon inquiry so as to charge him with knowledge of facts within the possible range of such inquiry."

<sup>2</sup> *Nelson v. Wade*, 21 Iowa, 49. See *Jones v. Bamford*, 21 Iowa, 217.

registry of a deed in which the land conveyed is described in such general terms, is not notice in law to a subsequent purchaser from the grantor of the existence of the deed; such a purchaser is not affected by actual notice of a deed of this character, and of its contents, unless he had notice also that the deed embraced the land purchased by him. It is also held that the proof of such notice must be sufficient to affect the conscience of the purchaser, and not merely to put him upon inquiry.<sup>1</sup> In Minnesota, under certain provisions of the statute, a mortgage may be foreclosed by "advertisement." But it is essential to the exercise of this right that the mortgage shall be "duly recorded."<sup>2</sup> Certain premises were described in a mortgage as the "west half of the southeast quarter of section 14." But the premises were described in the registry as the "west half of the northeast quarter of section 14." It was held that the mortgage was not "duly recorded," on account of the error in the record, and that a foreclosure of the same could not be had by advertisement.<sup>3</sup> A mortgage was executed to the State of Indiana for a loan of school funds. The premises affected were described by subdivisions, but the county and State in which they were situated were not named. The mortgagor brought an action to quiet title against a purchaser at a sale made by the county auditor. The court held that the mortgage was void for uncertainty in the description of the land, and that a sale by the auditor was consequently a nullity and conveyed no title to the purchaser.<sup>4</sup>

<sup>1</sup> *Mundy v. Vawter*, 3 Gratt. 518.

<sup>2</sup> Gen. Stat. Minn., c. 81, §§ 1, 2.

<sup>3</sup> *Thorp v. Merrill*, 21 Minn. 336. And see *Ross v. Worthington*, 11 Minn. 438, 443; 88 Am. Dec. 95; *Morrison v. Mendenhall*, 18 Minn. 232, 236.

<sup>4</sup> *Murphy v. Hendricks*, 57 Ind. 593. Said Biddle, C. J., for the court: "The vast territory lying northwest of the Ohio River was surveyed upon a system of base and meridian lines, under various acts of Congress, and this congressional survey is part of the public law which we must notice. Without naming the State or county, or without something by which the State and county could be ascertained, the description of the land in this mortgage would be just as applicable to the same township and range in reference to any other base and meridian line in the several States north-



**§ 652. Illustrations where purchaser bound, though description inaccurate.**—In a conveyance filed for record, the land was described as “the south half of the southeast quarter of section 15, town. 8 north, range 43 east, of the fourth principal meridian.” The correct description should have been “the south half of the southeast quarter of section 15, in town. 43 north, range 8 east, of the third principal meridian,” the numbers of the township and range having been transposed, and there being no land in the county corresponding to the description in the deed. It was held, however, that notwithstanding the misdescription, the registry laws were applicable, and that a purchaser was put upon inquiry and charged with knowledge of the conveyance of the premises.<sup>1</sup> The owner of a northeast corner of a lot of land sold it, but in the deed it was described as the northwest corner of the lot, which was the property of another. The grantee subsequently sold the land to third persons in payment of an antecedent debt, but, following the description in his deed, made the same mistake in his conveyance to the second grantees. When the mistake was discovered, the grantor and the grantee in the first deed, for the purpose of correcting the error in the former

west of the Ohio River, as it is to the base and meridian lines by which the survey of the lands in the State of Indiana were [was] made. It is impossible to ascertain, therefore, from the face of the mortgage, or from anything to which the mortgage refers, in what State or county the land described therein lies. As the mortgage is the basis of title in the appellants, we think it too uncertain to uphold their claim. In addition to the case cited, which we regard as being in point, the following authorities fully support the same principle: *Porter v. Byrne*, 10 Ind. 146; 71 Am. Dec. 305; *The Eel River Draining Assn. v. Topp*, 16 Ind. 242; *Munger v. Green*, 20 Ind. 38; *Gano v. Aldridge*, 27 Ind. 294; *Key v. Ostrander*, 29 Ind. 1; *German etc. Ins. Co. v. Grim*, 32 Ind. 249; 2 Am. Rep. 341; *Harding v. Strong*, 42 Ill. 148; 89 Am. Dec. 415, and 3 Wash. Real Prop. (4th ed.), pp. 384–412.” See, also, *Cochran v. Utt*, 42 Ind. 267. For other cases involving similar questions to those mentioned in this section, the reader is referred to *Galway v. Malchow*, 7 Neb. 285; *Brotherton v. Livingston*, 3 Watts & S. 334; *Lally v. Holland*, 1 Swan, 396; *Martindale v. Price*, 14 Ind. 115.

<sup>1</sup> *Partridge v. Smith*, 2 Biss. 183. See, also, *Polk v. Chaison*, 72 Tex. 500.

deeds, joined in a deed to the second grantees, of the northeast corner of the lot, its correct description. It was held that the second grantees were entitled to the land in equity as against a person who had purchased it, with notice of the error, under a judgment obtained against the original grantor after the execution of the first deed, but before the second deed correcting the error was made.<sup>1</sup> A lot was described in a mortgage by the number "eighteen," instead of its correct number "eight." A subsequent mortgage was executed, in which the lot was correctly described, but the second mortgagee had notice of the mistake in the first mortgage. It was held that the lien of the first mortgage attached to lot "eight," and that it was entitled to priority over the subsequent mortgage.<sup>2</sup> A mortgage was executed which described the land affected as "beginning two hundreds north of the southwest quarter of section number 34," but omitted by mistake the word "rods," after the word "hundreds." But the deed by which the mortgagor held the land, and which was recorded, contained a correct description of the land, describing it as beginning two hundred rods from the same corner mentioned in the mortgage. A subsequent mortgagee had knowledge that the land was occupied by the mortgagor as his homestead for a long period of time. It was held that the record, with the other facts, charged the subsequent mortgagee with notice of the prior mortgage and of the land intended to be affected.<sup>3</sup>

<sup>1</sup> *Gouverneur v. Titus*, 6 Paige, 347.

<sup>2</sup> *Warburton v. Lauman*, 2 Greene, 420, 424.

<sup>3</sup> *Bent v. Coleman*, 89 Ill. 364; 7 Am. Rep. 366. Said Mr. Justice Breese: "A person about to purchase this tract of land would naturally inquire into the title of the vendor; he would ascertain his source of title. This is the ordinary and usually the first inquiry. By turning to the records he would discover his vendor purchased the land of James Corunda, and received a deed therefor on April 11, 1855, in which the land was described as follows: Commencing two hundred rods north of the southwest corner, etc., containing forty acres of land. This deed was filed for record on April 13, 1855, and recorded May 4, 1855, and thereby open to the inspection of all persons. This reference, which a person of the most ordinary prudence would make, would have satisfied a searcher

**§ 653. Description by an impossible sectional number.**—If the premises are described by an impossible sectional number, the record of the deed, it follows in accord with the foregoing decisions, is sufficient to put a purchaser from the same grantor upon inquiry. He might, by pursuing such inquiry, obtain actual knowledge of the prior deed. “Let it be granted,” said Mr. Justice Breese, “that it was inaccurately recorded, the point we then make is, the record disclosed the fact that a deed for a

for the truth that there was a mistake in the description, and in this case the more especially, as all the mortgagees holding by mortgages subsequent, knew the land mortgaged was the homestead of their grantor. It was a well-improved tract, inclosed by a growing hedge, with a comfortable dwelling and other structures of a permanent and valuable character. The mortgagor occupied it from the time of his purchase from Corunda to the date of the last mortgage, something like twenty years. Appellant was familiar with the place, being a frequent visitor there, and knew when she took her mortgage it was his home place, and the record would have told her it was the forty acres he purchased of James Corunda.” A court of equity may reform a mortgage which omits a parcel of land which the parties intend to include, and the parcel omitted will be free from a judgment lien created after the execution of the mortgage: *White v. Wilson*, 6 Blackf. 448; 39 Am. Dec. 437. A conveyance described the land as “lot four of block one of the La Fontaine farm lying south of the river road, and fronting on Detroit river, being now used and occupied with the steam sawmill thereon, by the parties of the first part.” It appeared, however, that that portion of the La Fontaine farm had been platted into four lots or blocks, which had not been subdivided; the mill was situated on the one numbered four on the plat; the others were fenced in and occupied with the mill. The court held that the words “of block one,” of the above description, should be rejected, and that when the error in a conveyance is apparent, the record is notice to subsequent purchasers: *Anderson v. Baughman*, 7 Mich. 69; 74 Am. Dec. 699. See *Tousley v. Tousley*, 5 Ohio St. 78. A subsequent judgment lien is not entitled to priority because there has been an error in the description of a prior deed or mortgage: *Welton v. Tizzard*, 15 Iowa, 495; *Gillespie v. Moon*, 2 Johns. Oh. 585; 7 Am. Dec. 559; *Sevarts v. Stees*, 2 Kan. 236. For various instances on which omissions and inaccuracies in the description have been held immaterial, and not to affect the validity of a conveyance, because the land was sufficiently described to enable it to be identified, see *Thornhill v. Burthe*, 29 La. Ann. 639; *Consolidated Associated Planters v. Mason*, 24 La. Ann. 518; *Ellis v. Sims*, 2 La. Ann. 251; *Boon v. Pierpont*, 28 N. J. Eq. 7; *Slater v. Breese*, 36 Mich. 77; *Shepard v. Shepard*, 36 Mich. 173; *Baker v. Bank*, 2 La. Ann. 371; *Bank v. Barrows*, 21 La. Ann. 396; *Marcotte v. Coco*, 12 Rob. (La.) 167; *Bank v. Denham*, 7 Rob. (La.) 39.

tract of land with an impossible sectional number, in township thirty-four north, range three east, of the third principal meridian, was recorded, the names of the parties thereto distinctly appearing. Now, a party dealing with the grantor in such a deed would have his attention arrested by this singular description, and he would naturally be led to inquiry. The record afforded him abundant data, which, properly used and diligently inquired into, would inevitably lead him to the fact of the existence of the deed."<sup>1</sup>

**§ 654. Distinction between description in deed and mortgage.**—In Connecticut, it was intimated that a distinction exists between the sufficiency of a description of land in a deed and that of land in a mortgage. In the case in which this suggestion was made there were several mortgagors, and some of the parcels of land belonged to one of the signers, and some were the property of others. The mortgage described the land conveyed as "four certain farms situated in the town of Canaan, and bounded and described as follows," the farms being then separately described, and the description concluding in this language: "Also all such other lands as we, the grantors, or either of us, own or have any interest in, situate in said town of Canaan; reference being at all times had to the land records of said Canaan, and to the probate records for the district of Sharon, for more particular description of the same." There was another piece of land belonging to one of the grantors not adjacent to or connected with the farms described in the conveyance. On a bill to foreclose the mortgage, it was held by a majority of the court, the court standing three to two, that this last-mentioned piece was not conveyed by the mortgage.<sup>2</sup> Mr. Justice Pardee, who spoke for the majority of the court, said: "Whatever might be held with regard to the sufficiency of such a description in an ordinary deed intended merely

<sup>1</sup> *Merrick v. Wallace*, 19 Ill. 486, 498.

<sup>2</sup> *Herman v. Deming*, 44 Conn. 124.

to convey title, yet we think such a description clearly insufficient in the case of a mortgage. It is a fixed principle of our law that mortgage deeds should give subsequent creditors of the mortgagor definite information as to the debt due to the mortgagee, and as to the particular property pledged for its payment. It is only by knowing what the property is that they can learn its value, and it is as important to them to know its value as to know the amount of the debt for which it is mortgaged; and they are entitled to the law of registration in obtaining this information. To be told that the mortgage covers all the real estate which the grantor owns in the town of Hartford, is to impose upon them the examination of many thousand pages of records; for it is to be borne in mind that the grantor himself may have received his titles by the same general description, and from many different grantors. The recognition by the courts of such a mortgage as valid would be equivalent to the abrogation of the recording system, so far as mortgages are concerned. It is not unreasonable to require of the mortgagee that his deed should mention a name, or a locality, or point to a monument, or a particular deed, or refer to some book or page. It would be only his proper contribution to the upholding of a system which confers great benefits upon the public. We are of opinion, therefore, that the general description in this mortgage was not sufficient to convey the interest of Mrs. Scott, the owner, to the mortgagees. We are not prepared to say that we should apply the same rule without qualification, to a deed that was intended only as a conveyance of title. The policy of our law with regard to the definite information to be given to creditors and purchasers by mortgages, does not apply to ordinary conveyances. Here, however, comes in the policy of the law with regard to records of titles, which is applicable to all recorded conveyances, whether by absolute deed or mortgage.”<sup>1</sup>

<sup>1</sup> *Herman v. Deming, supra.* Continuing, the justice said: “In *North v. Belden*, 13 Conn. 380, 35 Am. Dec. 83, this court said: ‘It has never

§ 655. **Comments.**—We have not been able to find any other decision in any other State where this precise question has arisen. But we doubt that any valid ground exists for the distinction sought to be made. Certainly a correct description of the land affected would seem to be

been the policy of our law that the title to real estate should appear upon record, that it might be easily and accurately traced. This policy has added greatly to the security of our land titles, and has prevented much litigation which would otherwise have arisen.' And Swift in his Digest, vol. 1, p. 122, lays it down that 'it is essential that the land to be conveyed should be so located, butted, bounded, and described in the deed, as that it can be known where it lies, and be distinguished from any other tract of land, or there must be such reference to some known and certain description as will reduce the matter to certainty.' If we were to give judicial sanction to this form of conveyance, we should practically put an end to the recording system. If we say that such general language, following as here a particular description, does more than strengthen and secure what has gone before it, that it is sufficiently descriptive to support a distinct and independent grant of additional estate, and that it meets the requirements of that system, we should establish a precedent upon which grantees would hereafter rely, and from which the court would find it difficult to recede. After a succession of such conveyances, land records would cease to furnish any information; the same confusion would result as would come from the removal of all fences, mere-stones, and other monuments, which indicate the location of separating lines. The rule of law which declares that to be certain which can be made certain is not complied with in such a deed. The rule demands a reference and pointing to particular documents or records. If we say that such a reference is sufficiently explicit for the town of Canaan, and the probate district of Sharon, we say that it is proper for the town and probate district of Hartford, with its fifty thousand pages of records. A search through and an examination of these does not come within any reasonable interpretation of the rule. We are aware that courts have confirmed grants made in this general form; for instance, in 1814, in *Jackson v. De Lancey*, 11 Johns. 365, the court subjected to the operation of a deed made in 1770, a tract of land which was not otherwise described therein than in the following clause: 'And all other lands, tenements, and hereditaments belonging to said William Alexander, Earl of Stirling, within the province of New York.' This was made to rest upon the principle that grantors and grantees may make and take such conveyances as are satisfactory to themselves; and the principle is doubtless deduced from English decisions made without reference to any system of recording the transfer of title to real estate, made in cases where there was an actual delivery of possession by the grantor to the grantee in the presence of freeholders of the county. This gave actual notice to the public, and stood in the place of constructive notice by a record; the open, corporeal investiture upon the land itself,

as essential in one case as in the other, and whenever language is used which is sufficient to show the intention of the parties, it should receive the same construction, whether the land to which it is applied is conveyed by an absolute deed or is mortgaged.

**656. Instruments not entitled to registration.**—The registry acts authorize the recording of certain specified instruments, and their registration operates as notice. But the fact that an instrument is recorded is not sufficient to raise the presumption of notice, unless it be an instrument whose registration is authorized by statute. Otherwise the voluntary recording of it would be a nullity. The law on this subject is aptly stated by Mr. Justice Flandrau: "It is competent for the government to prescribe rules for the conveyance of lands within its jurisdiction, whether by deed, will, or otherwise, and it can impose such restrictions as are deemed for the best interests of its subjects. It may provide that the title to lands shall not pass unless the deed or will is upon paper, stamped by the State. It may declare that the instrument shall be attested by one, two, or more witnesses; and none of these requirements involve a greater exercise of authority than to say that the conveyance shall be in writing, as there is no reason except the statutes why a man should not pass his real as well as his personal estate by parol merely. That statutes requiring certain solem-

was equivalent to a record of specific boundaries. And the principle is not of universal application; as a matter of fact the law does put some limitations upon the freedom of grantors and grantees in the matter of transferring the title to real estate; for instance, there must be two witnesses to the signature of the grantor; he must acknowledge that it is his free act or deed before a magistrate, and the magistrate must certify to this fact. These may be considered as invasions of the absolute right of the owner to make the conveyance in a form satisfactory to himself. But as it is not necessary to the disposition of the case that we decide this point, we leave it open for future consideration, if any case shall arise that shall call for a decision of it. We are of the opinion that the mortgage in question did not convey to the petitioners any title to or interest in the lot of land belonging to Mrs. Scott, and that there is error in the judgment complained of."



nities to attend the execution of conveyances are imperative, and must be complied with to give validity to them, is illustrated by the action of courts in annulling wills and conveyances of land frequently for the want of a seal or other essential formality. That our legislature has always considered a departure from the statute forms as invalidating conveyances, is found in the fact that a series of acts have been passed, year after year, to save such as are defectively executed, while the same legislatures have steadily adhered to the forms first prescribed, and even added greater restrictions. When a party desires to purchase or take an encumbrance upon land, his guide as to the title is the records of the county, and it is a well-settled rule that the record of a deed is notice only of its contents so far as the record discloses it. If the record contain any instrument which is not authorized to be recorded, either from the nature of its subject matter, or a defect in its execution, it is a mere nullity, and is not notice for any purpose.”<sup>1</sup>

<sup>1</sup> In *Parret v. Shaubhut*, 5 Minn. 323, 328; 80 Am. Dec. 424; *Burnham v. Chandler*, 15 Tex. 441; *Commonwealth v. Rhodes*, 6 Mon. B. 171, 181; *Moore v. Hunter*, 6 Ill. (1 Gilm.) 317; *Bossard v. White*, 9 Rich. Eq. 483; *Reed v. Coale*, 4 Ind. 283; *Brown v. Budd*, 2 Cart. 442; *Lewis v. Baird*, 3 McLean, 56; *Galpin v. Abbott*, 6 Mich. 17; *Mott v. Clark*, 9 Barr. 400; 49 Am. Dec. 566; *Graves v. Graves*, 7 Gray, 391; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Ludlow v. Van Ness*, 8 Bosw. 178; *Villard v. Robert*, 1 Strob. Eq. 393; *Monroe v. Hamilton*, 60 Ala. 227. In *Moore v. Hunter*, *supra*, it is said: “The United States are the owners of all the vacant lands in this State, and until they have sold and received the price stipulated to be paid for any particular tract of land belonging to them, the recording acts of this State have no application. A contrary doctrine would lead to great injustice. Until the United States have parted with their title to the public lands, no purchaser would think of seeking for equities or encumbrances, affecting the title, in any other place than those offices where the lands were subject to entry or sale. When *Dunnegan* executed the deed to *Bates*, only part of the consideration for the land had been paid, and whether the land might not revert to the United States was altogether uncertain. To record the deed of *Dunnegan* was a useless act, not required by law, and the record, consequently, was not notice to any one.” See, also, *Keech v. Enriquez*, 28 Fla. 597; *McCroskey v. Ladd* (Cal.), 28 Vt. 216. That a deed not legally entitled to record does not constitute notice, see *White v. Magarahan*, 87 Ga. 217.

§ 657. **Illustrations.**—One partner conveyed to his copartner his entire interest in the partnership property as security for a debt. It was held that the registration of the mortgage would operate as constructive notice as against subsequent creditors and purchasers of the lien created on the interest of the mortgagor in the property. But the court held that it could not have this effect, so far as any restraint or limitation was imposed by it on the authority of the mortgagor as a partner.<sup>1</sup> “This principle of constructive notice from registration is confined to instruments which the statute authorizes to be registered. It cannot be extended to any and every instrument which parties may think proper to register. There must be a statute authorizing the registration, or mere registration will not operate as notice.<sup>2</sup> Nor will registration operate as constructive notice of any and every provision which may be introduced into an instrument, of which it is required. A conveyance of personal property may include a transfer of choses in action, and while operating as constructive notice of the transfer of the particular personal property described, it would not operate as a notice of the transfer of the choses in action.<sup>3</sup> The reason is obvious: the law does not authorize the registration of transfers of choses in action, and, therefore, does not cast on those dealing with him who has the possession and the apparent legal title, the duty to ascertain whether there has been an assignment of them. We have no statute (except as to limited partnerships) which authorizes the registration of articles of partnership, or of limitations or restraints which by agreement may be placed on the power and authority of a partner. While, so far as the mortgage is a conveyance of Hamilton’s undivided share of the joint crops, its registration is constructive notice thereof; so far as it is a restraint or limitation of

<sup>1</sup> *Monroe v. Hamilton*, 60 Ala. 227.

<sup>2</sup> Citing *Mitchell v. Mitchell*, 3 Stewt. & P. 81; *Dufphey v. Freenaye*, 5 Stewt. & P. 215; *Baker v. Washington*, 5 Stewt. & P. 142; *Tatum v. Young*, 1 Port. 298.

<sup>3</sup> Citing *McCain v. Wood*, 4 Ala. 258; *Stewart v. Kirkland*, 19 Ala. 162.

his authority as partner, the registration is not constructive notice."<sup>1</sup> Where both real and personal estate are conveyed by the same deed, the registry of the deed is not of itself constructive notice of the assignment of the personal estate.<sup>2</sup> A recital in a deed is evidence that the purchaser had notice of the fact recited. But this is true only so far as it concerns the title to the land purchased. The recital will not affect him with notice in regard to the title of any other land than that conveyed by the deed.<sup>3</sup> A deed of assignment when not authorized to be recorded does not impart notice because it is recorded.<sup>4</sup> Subsequent purchasers are not charged with constructive notice of the facts appearing from the entry of lands sold by the United States, upon the land-book in the county clerk's office, as such entry is required only for the purposes of taxation.<sup>5</sup> The registration of executory agreements for the sale of real property, if not authorized by statute, does not impart notice.<sup>6</sup> If the statute does not authorize the registration of a certified copy of a record of a deed, such registration is a nullity.<sup>7</sup>

**§ 658. Want of delivery.**—If a conveyance has not been delivered, the fact that it is registered does not cause

<sup>1</sup> Per Brickell, C. J., in *Monroe v. Hamilton*, 60 Ala. 227.

<sup>2</sup> *Pitcher v. Barrows*, 17 Pick. 361; 28 Am. Dec. 306. Said Shaw, C. J.: "But we think this is not constructive notice, any further than the statute has made it so, to wit, of the transfer of real estate. The fact that the assignment of the personal estate was in the same deed with the real, was merely accidental. If the plaintiff had had occasion to take a deed of Walcott, of real estate, the registry would have been conclusive evidence of constructive notice, whether in fact he examined the registry or not. But if he had no occasion to take a conveyance of real estate, he had no occasion to examine the registry, and the law does not presume that he did do it. As to that part of its contents relating to personal estate, there is no legal presumption that its contents were known to the plaintiff."

<sup>3</sup> *Boggs v. Varner*, 6 Watts & S. 469.

<sup>4</sup> *Burnham v. Ohandler*, 15 Tex. 441.

<sup>5</sup> *Betser v. Rankin*, 77 Ill. 289.

<sup>6</sup> *Mesick v. Sunderland*, 6 Cal. 297.

<sup>7</sup> *Lund v. Rice*, 9 Minn. 230; *Stevens v. Brown*, 3 Vt. 420; 23 Am. Dec. 215; *Pollard v. Lively*, 2 Gratt. 216; *Lewis v. Baird*, 3 McLean, 56; *Oatman v. Fowler*, 43 Vt. 462.

it to prevail over a conveyance subsequently made, or a lien subsequently acquired. Thus, a judgment against a mortgagor was given the preference over a mortgage which was, in the absence and without the knowledge of the mortgagee, delivered by the mortgagor to the recorder of the proper county to be recorded, where the judgment was obtained before the mortgagee had assented to the mortgage.<sup>1</sup> Where a deed has been unconditionally delivered to the grantee, irrespective of the question whether the consideration has been paid or secured, the deed may be recorded without the grantor's consent.<sup>2</sup> This principle relates more to the validity of the instrument than it does to the effect of the record. The instrument is not operative until delivery. "A deed takes effect by delivery. An execution and registration of a deed, and a delivery of it to the register for that purpose, do not vest the title in the grantee. Nothing passes by it."<sup>3</sup> This topic has been fully discussed in the chapter on delivery.<sup>4</sup>

**§ 659. Equitable mortgages.**—At one time it was considered that a mortgage of an equity was not within the purview of the registry acts, and hence that the registration of such a mortgage was not constructive notice.<sup>5</sup> But it is now established that the policy of these statutes requires all liens and encumbrances, whether legal or equitable, affecting the title to real estate, to be recorded, and therefore, as a general proposition, a mortgage of an equitable interest in land, taken without notice, is, if first recorded, preferred to any conveyance of, or encumbrance

<sup>1</sup> *Goodsell v. Stinson*, 7 Blackf. 437. See, also, *Fitzgerald v. Goff*, 99 Ind. 28; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Parker v. Hill*, 8 Met. 447; *Owings v. Tucker*, 90 Ky. 297; *Hoadley v. Hadley*, 48 Ind. 452; *Goodwin v. Owen*, 55 Ind. 243; *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Woodbury v. Fisher*, 20 Ind. 387; 83 Am. Dec. 325; *Henry v. Carson*, 96 Ind. 412; *Fitzgerald v. Goff*, 99 Ind. 28; *Freeman v. Peay*, 23 Ark. 449; *Ward v. Small*, 90 Ky. 198.

<sup>2</sup> *Ronan v. Meyer*, 84 Ind. 390.

<sup>3</sup> *Samson v. Thornton*, 3 Met. 275, 281; 27 Am. Dec. 135.

<sup>4</sup> See §§ 290–293. See, also, *Woodbury v. Fisher*, 20 Ind. 387; 83 Am. Dec. 325; *Hedge v. Drew*, 12 Pick. 141; 22 Am. Dec. 416.

<sup>5</sup> *Boswell v. Buchanan*, 3 Leigh, 365; 23 Am. Dec. 280.

upon, such land.<sup>1</sup> It is held that a person in possession of land under a parol contract of sale may mortgage his interest, and although the mortgagor may not have acquired the absolute fee, such mortgage is entitled to registration, and if recorded, is notice to subsequent purchasers and encumbrancers.<sup>2</sup> But it is held in Illinois, where one has only an equitable title derived from a bond for a deed which is not recorded, that the record of a mortgage given by him is not notice to a subsequent purchaser of the legal title from one in possession of the land. The title of a purchaser of this description is not derived through the title of the mortgagor. Hence, he will not take, it is held, subject to the mortgage, notwithstanding the fact that it is recorded.<sup>3</sup>

**§ 660. Assignment of mortgage.**—Under some of the early statutes, it was held that an assignment of a mortgage was not entitled to registration. Thus, in Indiana, before the passage of the statute allowing the registration of the assignments of mortgages, it was held that recording them did not give notice.<sup>4</sup> But in that State, a statute now exists which permits the registration of such assignments.<sup>5</sup> And, generally, at the present day, either by the express provision of a statute, or by judicial construction of the registry acts, assignments of mortgages are considered as instruments entitled to registration.<sup>6</sup>

<sup>1</sup> *Parkist v. Alexander*, 1 Johns. Ch. 394; *Jarvis v. Dutcher*, 16 Wis. 307; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 69 Am. Dec. 174; *Crane v. Turner*, 7 Hun, 357; *Boyce v. Shiver*, 3 S. C. 515.

<sup>2</sup> *Crane v. Turner*, 7 Hun, 357.

<sup>3</sup> *Irish v. Sharp*, 89 Ill. 261. See *Halsteads v. Bank of Kentucky*, 4 Marsh. J. J. 554; *Bank of Greensboro v. Clapp*, 76 N. Y. 482.

<sup>4</sup> *Hasleman v. McKernan*, 50 Ind. 441; *Dixon v. Hunter*, 57 Ind. 278.

<sup>5</sup> Acts of 1877, Ind. c. 58; § 1.

<sup>6</sup> *Bank of Indiana v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390; *Bowling v. Cook*, 39 Iowa, 200; *Tradesman's etc. Assn. v. Thompson*, 31 N. J. Eq. 536; *Stein v. Sullivan*, 31 N. J. Eq. 409; *Fort v. Burch*, 5 Denio, 187; *James v. Morey*, 2 Cow. 246; 14 Am. Dec. 475; *Belden v. Meeker*, 47 N. Y. 307; *Turpin v. Ogle*, 4 Bradw. (Ill.) 611; *Smith v. Keohane*, 6 Bradw. (Ill.) 585; *Cornog v. Fuller*, 30 Iowa, 212; *McClure v. Burris*, 16 Iowa, 591; *Vanderkemp v. Shelton*, 11 Paige, 28; *Campbell v. Vedder*, 1 Abb.

But the mortgagor himself is not bound by the registration of the assignment of the mortgage. He should have actual notice to prevent him from claiming the benefit of payments made to the mortgagee.<sup>1</sup> This principle has been expressly declared by statutes in several States. Thus, selecting California as an instance, it is provided by the code: "When the mortgage is executed as security for money due, or to become due, on a promissory note, bond, or other instrument, designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond, or other instrument."<sup>2</sup> But the mortgagor is entitled to this protection only when he makes a payment. If the mortgagee release the mortgage without the payment of any consideration, the release is inoperative against the assignee of the mortgage, who has his assignment recorded.<sup>3</sup> The mortgagor is not entitled to this protection of making a payment to the mortgagee, when the mortgage is given as security for the payment of a negotiable note, and this has been transferred before maturity.<sup>4</sup> A conveyance of the premises to the mort-

N. Y. App. 295; *James v. Johnson*, 6 Johns. Ch. 417; *St. Johns v. Spalding*, 1 Thomp. & C. 483; *Pepper's Appeal*, 77 Pa. St. 373; *Leech v. Bonnell*, 9 Phil. 204; *Neide v. Pennypacker*, 9 Phil. 86; Maryland R. Code, 1878, art. xlv, §§ 37, 38; Cal. Civil Code, § 2934. In *Belden v. Meeker*, the earlier case of *Hoyt v. Hoyt*, 8 Bosw. 511, was overruled.

<sup>1</sup> *New York Life Ins. etc. Co. v. Smith*, 2 Barb. Ch. 82; *Ely v. Scofield*, 35 Barb. 330; *Jones v. Gibbons*, 9 Ves. 407, 410.

<sup>2</sup> Cal. Civil Code, § 2935. For other States in which similar provisions exist, see New York, *Fay's Dig. of Laws*, 1874, vol. 1, p. 585; Minnesota, Gen. Stats. 1878, c. 40, § 24; Kansas, *Dassler's Stats.* 1876, c. 68, § 3; Nebraska, Gen. Stats. 1873, c. 61, § 39; Comp. Stats. 1881, p. 392; Wisconsin, Rev. Stats. 1878, p. 641, § 2244; Oregon, Gen. Laws, 1872, p. 519; Michigan, Comp. Laws, 1871, p. 1847; Wyoming Ty., Comp. Laws, 1876, c. 3, § 17.

<sup>3</sup> *Belden v. Meeker*, 47 N. Y. 307; *Viele v. Judson*, 82 N. Y. 32. But in Massachusetts it is held otherwise: *Wolcott v. Winchester*, 15 Gray, 461; *Welch v. Priest*, 8 Allen, 165; *Blunt v. Norris*, 123 Mass. 55; 25 Am. Rep. 14.

<sup>4</sup> *Jones v. Smith*, 22 Mich. 360.

gagee, after the assignment of the mortgage, will not cause a merger of the mortgage title.<sup>1</sup> But of course as against all other persons than the mortgagor, who claim title other than through the mortgagee, the registration of the assignment of the mortgage is unnecessary. The original mortgage still stands, and is not, so far as priority of record is concerned, affected by the assignment.<sup>2</sup> In New York, it has been held that a power of attorney to assign a mortgage is not an instrument whose registration is provided for by the recording acts. The record of such an instrument is not notice.<sup>3</sup> And in the same State a similar decision was made with reference to a power of attorney to collect the amount due on a mortgage and to release it.<sup>4</sup> An unrecorded agreement between the mortgagor and the mortgagee, that the latter should release from the operation of the mortgage a part of the land, upon receiving the payment of a specified sum, does not bind the assignee of the mortgage.<sup>5</sup>

§ 661. In some States defective deeds if recorded impart notice.—In a few of the States, the rule seems to prevail that a deed defectively executed or unacknowledged is, if actually recorded, sufficient notice of the equities created thereby. In Illinois, where this rule obtains, Scates, C. J., cites a number of authorities in opposition to the rule he proceeds to lay down, and ob-

<sup>1</sup> Campbell v. Vedder, 3 Keyes, 174; s. c. 1 Abb. N. Y. App. Dec. 295; Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532.

<sup>2</sup> Sprague v. Rockwell, 51 Vt. 401; Campbell v. Vedder, 3 Keyes, 174; Viele v. Judson, 82 N. Y. 32. A person who afterward purchases from the mortgagee is required to ascertain whether the mortgage has not been previously assigned. If he does not make this search, he cannot claim protection as a *bona fide* purchaser. See on this subject, Gillig v. Maass, 28 N. Y. 191; Oregon Trust Co. v. Shaw, 5 Saw. 336; Warner v. Winslow, 1 Sand. Ch. 430; Purdy v. Huntington, 42 N. Y. 334; Burhans v. Hutcheson, 25 Kan. 625; 37 Am. Rep. 274; Van Keuren v. Corbins, 6 Thomp. & C. 355.

<sup>3</sup> Williams v. Birbeck, Hoffm. 359.

<sup>4</sup> Jackson v. Richards, 6 Cowen, 617.

<sup>5</sup> Warner v. Winslow, 1 Sand. Ch. 430; St. John v. Spalding, 1 Thomp. & C. 483.



serves: "I have referred to these decisions to show that they were made upon statutes differing from ours; some excluding from registration and record, deeds, etc., which were too defective to pass the estate; others, for want of compliance with the law in relation to acknowledgments. Our statute has introduced a very different policy, both as to the kinds and character of the instruments and the acknowledgments. In its language it comprehends everything that may relate to or affect the title, and requires all such to be recorded without any qualification as to whether they be sufficient in law or not, to effectuate the object purported on their face. It would seem to us to be the intention of the legislature, in general, to make the registry and recording books, and the filing of levies, etc., as complete a depository as possible of the State, of land titles, as they may be presented and affected by conveyances, contracts, encumbrances, and liens."<sup>1</sup> In that State, in accordance with this construction of the statute, it is held that though a deed of trust executed by a married woman to secure the purchase money due on the premises, may be void as a conveyance because her husband does not unite with her in it, yet, nevertheless, it is an instrument in writing relating to real estate, and after registration is constructive notice to all subsequent purchasers of the lien of the vendor for the unpaid price.<sup>2</sup> "It is, undoubtedly," said Mr. Justice Dickey, "the policy of our recording laws that every instrument in writing relating to land, when once recorded, shall be notice to the world of everything stated in such instrument, and of everything which is necessarily implied from the words of the recorded instrument. Those appellants claiming as subsequent *bona fide* purchasers or encumbrancers occupy the same position in this case as they would have done had this instrument (not having been recorded) been read aloud to them by the appellee, before they became in any way interested in this question. As against her grantee, there can be

<sup>1</sup> Reed v. Kemp, 16 Ill. 445, 451.

<sup>2</sup> Morrison v. Brown, 83 Ill. 562.

no doubt of her right to assert a vendor's lien. As to the others, they have constructive notice of her equities. This deed of trust by a *feme covert* (her husband not joining with her in its execution) has no validity as a conveyance. It has no force or power to *create* a lien. A married woman can, however, without the aid of her husband, accept a deed and hold title to land. She can also tell the truth, and there is no law to render its utterance ineffectual. Under our statute, as to the effect, as notice of recording instruments in writing relating to land, the execution and recording of this instrument becomes equivalent to a personal declaration of her equitable rights to each of appellants claiming as *bona fide* purchasers." <sup>1</sup>

§ 662. In Kansas, the same construction is placed upon the statute of that State. The statute provides that "no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded." The court considered this to mean that *any* instrument, affecting real estate, would be good against subsequent purchasers if recorded. It said: "The statute nowhere makes an acknowledgment necessary to the validity of a deed. If it be sufficient to affect real estate without acknowledgment, then it may be recorded, and if it be recorded, then subsequent purchasers are charged with notice. The statute only goes to the extent of providing that if a deed be acknowledged and certified in the manner prescribed, the original may be read in evidence, without proof of the execution; or, if recorded, a certified copy of the record, upon proper proof of inability to produce the original, may be read." The court accordingly held that a deed having been in fact recorded in the proper office, although not acknowledged, was constructive notice.<sup>2</sup>

§ 663. Registration in wrong county.—The various statutes require that a deed shall be recorded in the

<sup>1</sup> Morrison v. Brown, *supra*.

<sup>2</sup> Simpson v. Brown, 3 Kan. 172; Brown v. Simpson, 4 Kan. 76.

county in which the land conveyed by it is situated. A person desirous of ascertaining the condition of the title to a particular piece of land, is not compelled to search the records of every county in the State to accomplish this result. If he examines the records of the county in which the land lies, he does all that the law demands, and he may safely act upon the information thus disclosed. If a deed is recorded in a different county from that in which the land is situated, the record cannot operate as constructive notice.<sup>1</sup> And, of course, it is immaterial that the deed is recorded in the wrong county under a mistake as to the true locality of the land.<sup>2</sup>

§ 664. **Land in two counties.**—Where the land embraced in a deed is situated in more counties than one, the deed should be recorded in every county in which any part of the land lies.<sup>3</sup> “The object of the registry acts was to enable a person about to purchase lands, to ascertain whether they had been conveyed. In order to do this, the place where he must reasonably be led to make the inquiry is the probate clerk’s office of the county where the land lies. That is the place intended by law for recording the deed of conveyance; and if, upon examination, he finds no conveyance there, he is justified in acting upon the belief that none has been made. If this were not true, a person could not safely purchase land lying in any particular county, without an examination of the probate clerk’s office of every county in the State; for the land which he is about to purchase might be embraced in a deed, conveying, also,

<sup>1</sup> *King v. Portis*, 77 N. O. 25; *Harper v. Tapley*, 35 Miss. 508, 510; *Adams v. Hayden*, 60 Tex. 223; *Perrin v. Reed*, 35 Vt. 2; *Stewart v. McSweeney*, 14 Wis. 468, 471; *Harris v. Monro Cattle Co.*, 84 Tex. 674; *Hawley v. Bullock*, 29 Tex. 216.

<sup>2</sup> *Adams v. Hayden*, 60 Tex. 223. See *Jones v. Powers*, 65 Tex. 207.

<sup>3</sup> *Perrin v. Reed*, 35 Vt. 2; *Stevens v. Brown*, 8 Vt. 420; 23 Am. Dec. 215; *Horsley v. Garth*, 2 Gratt. 471; 44 Am. Dec. 393; *Astor v. Wells*, 4 Wheat. 466; *Stewart v. McSweeney*, 14 Wis. 468; *Orosby v. Huston*, 1 Tex. 203; *Hundley v. Mount*, 8 Smedes & M. 387. See *Hill v. Wilson*, 4 Rich. 521; 55 Am. Dec. 696; *Bagley v. Kennedy*, 94 Ga. 651.

land in some other county, and recorded in that county”<sup>1</sup> The deed is properly recorded in any county in which a part of the land is situated.<sup>2</sup> A deed so recorded in one county is considered as admissible in evidence, under the Michigan statute, in any other county as to any of the lands described in it that lie within the State.<sup>3</sup>

**§ 665. Registration of copy of deed in proper county.** If a deed has been recorded in the wrong county, and a copy of such record has been recorded in the proper county, the record of the copy cannot avail as notice to subsequent purchasers. This rule rests upon the ground that such copy is not entitled to be recorded, and hence conveys no notice.<sup>4</sup> In a case where it was insisted that a record in one county of a copy of a deed from another county was sufficient to put subsequent purchasers upon inquiry, the court said: “To hold that parties ought to have been put upon inquiry by this record would be precisely the same thing as holding them affected with notice. This would be giving to the record of an instrument not entitled to be recorded the same force, as to notice, that we give to one legally reduced to record. We do not think any authority can be found in support of this proposition. On the contrary, the familiar rule, and one laid down by this court, is, that the record of an instrument not entitled by law to be recorded is of no avail as notice.<sup>5</sup> It is said that a purchaser, as a matter of fact, receives the same information from the record of a copy as from the record of an original instrument. That may be true. But the broad difference is this: “The statute only authorizes the record of original instruments, and it makes that record conclusive evidence of notice. It matters not that a subsequent purchaser has not, as a matter of fact, seen the record. If the in-

<sup>1</sup> Harper v. Tapley, 35 Miss. 506, 509, per Handy, J.

<sup>2</sup> Brown v. Lazarus, 25 S. W. Rep. 71; 5 Tex. Civ. App. 81.

<sup>3</sup> Wilt v. Cutler, 38 Mich. 189.

<sup>4</sup> Lewis v. Baird, 3 McLean, 56; Pollard v. Lively, 2 Gratt. 216.

<sup>5</sup> Citing Moore v. Hunter, 1 Gilm. 317.

strument has been legally recorded, the law presumes him to have seen it, and holds him to the consequences of such knowledge. Not so as to the registry of a copy. It may be that, if a party can be clearly proven to have read the record, he should be held to have derived from it the same degree of actual knowledge that he would have derived from seeing a copy of an instrument in the hands of a private individual. He might be considered as put upon inquiry. But the law does not presume him to have read the record of an instrument not authorized to be recorded.”<sup>1</sup>

**§ 666. Certified copy of deed recorded in wrong county as evidence.**—Related to the subject we are now considering is the question whether a certified copy of a deed recorded in a county other than that in which the land is situated, can be received in evidence in the proper county to affect the title to the premises described in the deed. It is held that where deeds embrace lands lying in two counties, and are recorded in only one of them, exemplifications of the records are competent evidence upon the proof of the loss of original deeds to prove their contents in an action of ejectment for the recovery of the premises which lie in that county where the deeds were not recorded.<sup>2</sup> But it is also held that an authenticated copy of a deed recorded in a county in which the land does not lie, is not competent evidence of the original, for the reason that “where the law gives no authority for the reception of such acknowledgment or proof and admission to recordation, the record of those acts, and the certificate of the public custodier of the record, are entitled to no more respect than if the same had been performed by a private individual.”<sup>3</sup>

<sup>1</sup> *St. John v. Conger*, 40 Ill. 535, 536, per Lawrence, J., delivering the opinion of the court.

<sup>2</sup> *Jackson v. Rice*, 3 Wend. 180; 20 Am. Dec. 683; *Scott v. Leather*, 3 Yeates, 184. And see *Lessee of Delancey v. McKeen*, 1 Wash. O. O. 354; *Conn v. Manifee*, 2 Marsh. A. K. 396; 12 Am. Dec. 417; *Simms v. Read*, Cooke, 345.

<sup>3</sup> *Pollard v. Lively*, 2 Gratt. 216, 218. In *Lewis v. Baird*, 3 McLean, DEEDS, VOL. II.—57

**§ 667. Presumption of actual notice from examination of records.**—In a case in Pennsylvania, the land conveyed by a deed was situated in two counties, but the deed was recorded in one of them only. Attached to the deed, written under the certificate of acknowledgment, was a memorandum stating that part of the land had been sold. It was not satisfactorily shown that the memorandum referred to was written before the execution of the deed, but the deed with the memorandum was recorded. The lower court instructed the jury that the memorandum on the original deed, if it was there at the time of the execution of the deed, constituted a part of the deed and was legally recorded; and as part of the land conveyed by the deed was situated in the county in which the deed was recorded, and in which the plaintiff resided, that such record was notice to him of the contents of the memorandum, and bound him also as to the part situated in the other county in which the deed was not recorded. The supreme court held that it was a reasonable presumption that the plaintiff inspected the registry in the proper county, and thus acquired actual notice of the conveyance, but reversed the case because the registry was defective in the fact that the memorandum was not acknowledged, and hence was not entitled to be recorded.<sup>1</sup> Chief Justice Gibson on the first point, after adverting to previous decisions that the registry of a deed defectively acknowledged is not constructive notice as to land in the proper county, and is deemed no evidence of notice whatever, said: "These authorities are not controverted; but it has been intimated that a presumption may arise of actual

56, 63, it is said: "But if the deed were a conveyance in fee of these military lands, a record of it in Kentucky, though duly certified, would not make the copy evidence in this State. The deed is required to be recorded in this State, after it has been duly acknowledged, and a certified copy of the record thus made is evidence under the statute. The recording of the deed, therefore, in Kentucky, if clearly shown, would not make either a certified or sworn copy from the record evidence. The original being lost, a sworn copy of it is the next best proof." See *Kennedy v. Harden*, 92 Ga. 230; 18 S. E. Rep. 542.

<sup>1</sup> *Kerns v. Swope*, 2 Watts, 75.

inspection of the defective registry, which is said to amount to actual notice of the contents of the original paper. The ground of the supposed presumption is the fact that the plaintiff purchased along with the tracts in dispute, certain other tracts included in the conveyance to the bank, which are situate in Huntingdon county, where the conveyance and what purports to be the memorandum containing a recital of the material facts were registered together; and as the original was lost, it is supposed to be a reasonable presumption that the plaintiff purchased on the faith of the registry in that county, and actually inspected it. Nothing is more reasonable.”<sup>1</sup>

<sup>1</sup> *Kerns v. Swope*, 2 Watts, 75. The learned justice said, however, that the registry was defective. “The memorandum of the recital, thought to be material, purports, according to the registry, to have been indorsed on the conveyance, but underneath the certificate of the acknowledgment, which contains neither reference nor allusion to it; and the original was therefore destitute of the evidence of authentication required by the law to entitle it to be registered. The registration, therefore, being without the authority of the law, was the unofficial act of the officer, which could give the copy no greater validity than the original, deprived of legal evidence of execution; nor even so much, for an original deed exhibited to a purchaser would affect him though it were unaccompanied with the evidence of its execution. But here the registry was no better than a copy made by a private person in a memorandum-book, from which a purchaser would be unable to determine whether there was, in fact, an indorsement on the deed, or whether it had been truly copied, especially when neither the copy nor an exemplification of it would be legal evidence of the fact in a court of justice. Unquestionably a purchaser would not be affected by having seen the copy of a conveyance among the papers of another, or an abstract of it in a private book. The whole effect of a registry, whether as evidence of the original or as raising a legal presumption, that the copy thus made equipollent to the original had been actually inspected by the party to be affected, is derived from the positive provisions of the law; and when unsustained by these, a registry can have no operation whatever. Stripped of artificial effect, it is but the written declaration of the person who was officer at the time, that he had seen a paper in the words of the copy which purported to be an original. But to say nothing in this place of the incompetency of such a declaration as evidence of the fact, on what principle would a purchaser be bound to attend the hearsay information of one who is not qualified to give it. Since the decision in *Cornwallis' case*, Toth. 254, and *Wildgoose v. Wayland*, Goulds. 147, pl. 67, it has been considered a settled principle that the vague reports of strangers, or information given by a person not interested in the property, are insufficient. It has been held even that a general claim may be disre-



In New Hampshire, under the statute in force at the time the decision was rendered, it was necessary that a deed should be attested by two witnesses. A deed, however, with one witness, or none at all, was good between the parties. A deed witnessed by one witness only was recorded. The court held that the grantee in such a deed is entitled to the land against a subsequent attachment and extent, if the creditor, at the time of his attachment, had notice of the deed, and that actual notice of the record will be regarded as actual notice of the prior deed.<sup>1</sup> "As the deed in this case," said Perley, J., "was not executed according to the statute, the registration as such is inoperative; that is to say, the registration is not constructive notice of the conveyance. But, if by means of that registration of the defective deed, the defendants had actual notice of the plaintiff's title, they are charged with the notice as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that the plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon."<sup>2</sup>

§ 668. **Comments.**—The case of *Kerns v. Swope*<sup>3</sup> can scarcely be regarded as an authority for the proposition

garded. There certainly are cases which seem to cast a doubt on the principle. But as is properly remarked by Mr. Sugden in his treatise on Vendors, the point of notice to which the remark of Chief Baron Hale was directed, in *Fry v. Porter*, 1 Mod. 300, did not relate to a purchaser. In *Butcher v. Stapely*, 1 Vern. 364, the purchaser was affected with notice, of which it is said, there was no other *direct* evidence than what might have been gleaned from the conversation of some neighbors, who said that they had heard that the vendor had sold the estate to the plaintiff. It is obvious that to decree on parol evidence of loose conversations in the presence of the party, which may not have been heard or understood by him, would be attended with extreme danger of injustice; and, notwithstanding this decision, the rule seems to be established as I have stated it, having been recognized by this court in *Peebles v. Reading*, 8 Serg. & R. 480, and *Ripple v. Ripple*, 1 Rawle, 386."

<sup>1</sup> *Hastings v. Cutler*, 4 Fost. (24 N. H.) 481.

<sup>2</sup> *Hastings v. Cutler*, *supra*.

<sup>3</sup> 2 Watts, 75.

that a presumption of fact exists that a purchaser inspects the records, and thus obtains notice of the contents of conveyances spread upon the records, affecting the title not only to lands situated in the county in which the records are, but also of lands situated in that and other counties. The court declares, it is true, that this is a reasonable presumption, but the case was decided on the point that the portion of the deed in question was not acknowledged, and hence not entitled to registration. The remarks of the court, therefore, upon the question of presumption may be treated as *obiter dicta*. The rule indicated by the court in that case can rest upon no sound reason. Whether a purchaser inspects or does not inspect the records of the county in which the land he is about to purchase is situated, cannot be made a matter of presumption. It is a matter of fact, of evidence. To adopt the rule that actual notice should in such a case be presumed is, in the opinion of the author, to establish a doctrine in direct conflict with the spirit and intent of the whole system of registration laws. Constructive notice can seldom be equivalent to actual notice. Yet, if the statutes relative to registration are complied with, a subsequent purchaser is bound by the information contained in the records, whether he has actual knowledge of the facts or not. But the whole current of decision is to the effect that, to give the record this character of affording constructive notice, every requirement of the statute must be observed. A failure in any essential respect renders the record ineffectual as constructive notice. In *Hastings v. Cutler*,<sup>1</sup> a more reasonable rule is laid down, yet one to which objection may be raised. It is not, however, unreasonable to require a person who has actual knowledge that there is a deed, valid between the parties in existence, to make inquiry to ascertain the rights of the grantee. But it is presumed that, under this decision, it would first be necessary to show such actual knowledge by competent evidence. No

presumption can result that a purchaser had such knowledge.

§ 669. **Change of boundaries of county.**—If a deed has been registered in the county in which the land lies, it is not necessary to record it again in a new or other county into which the former county may be divided, or to which it may be annexed. “We are not apprised of any statute which would require an owner of land, having his deed properly registered in the county where the land lies, to have his conveyance again recorded as often as, by subdivisions and changes, the land may fall into a new or different county. Very prudent men may use such precautions. But it is not necessary for the protection of their rights, the first registry being amply sufficient.”<sup>1</sup> If the land, at the date of the deed, lies in one county, but if, at the time it is presented for registration, a new county has been carved out of the old one, which includes the land described in the deed, the conveyance must be recorded in the new county, and not in the old.<sup>2</sup>

<sup>1</sup> McKissick v. Colquhoun, 18 Tex. 148.

<sup>2</sup> Garrison v. Hayden, 1 Marsh. J. J. 222; 19 Am. Dec. 70. This case was an action of ejectment, and the plaintiff, in deraigning title, offered a deed certified by the clerk of the county court of Fayette for the land, acknowledged and recorded in that county. The land, at the date of the deed, was in Fayette county, but, at the time it was acknowledged, was in Jessamine, which county had, in the interval between the date and acknowledgment, been established. The *nisi prius* court rejected the certified copy of the deed, and this was claimed to be error. The court said: “A proper construction of either the letter or object of the act of assembly, which requires deeds for land to be recorded in the county in which the land lies, must sustain the opinion of the circuit court. The deed must be recorded in the county in which the land lies at the time the deed is deposited for registration. When a party is about to deposit his deed to be recorded, the act of assembly addresses him in this language: ‘Have it recorded in the county in which the land lies; that is, the county in which the land lies now when you make the deposit.’ The object of this requisition is to give notice in the county of the transference of the title to the land. As, therefore, the clerk of Fayette had no legal right to receive the acknowledgment, his certificate of the fact of acknowledgment is no authentication of the deed. The recording of a deed not being necessary to pass the title, as between the parties to it, proof of the original by the subscribing witnesses would have been sufficient for the plaintiff in this

§ 670. **Purchaser under quitclaim deed—Comments.** The law is not uniform on the question whether a grantee under a quitclaim deed is to be considered a *bona fide* purchaser, entitled to the protection of the registry laws. By a conveyance of this character he succeeds to such title only as the grantor possesses at the time the deed is executed.<sup>1</sup> He cannot claim the benefit of any title subsequently acquired by his grantor. It has in some States been held that as he obtains the grantor's title only, he acquires nothing at all, if the grantor has previously transferred this title to another, and that it is immaterial whether he has notice of this fact or not. On the other hand, it is considered in other States, that this conveyance is effectual to convey such title as the grantor possesses, and such title as, under the registry laws, the grantee has a right to assume, is vested in the grantor.

§ 671. **View that such purchaser is not entitled to the protection of the registry acts.**—The doctrine that a purchaser under a quitclaim deed is not a *bona fide* purchaser without notice, prevails in many courts, and is supported by eminent authority. It was held in some of the earlier decisions of the United States, that "a purchaser by a deed of quitclaim, without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration without notice; and he takes only what the vendor could lawfully convey."<sup>2</sup> But

case. But, as he chose not to offer such proof, and relied on the certificate of the Fayette clerk, he must abide the consequence of his error," See, also, *Bell v. Fry*, 5 Dana, 344. Where there has been a change in the boundaries of a county, a deed is properly recorded in the county in which the land was situated at the time of recording: *Green v. Green*, 103 Cal. 108. See *Kennedy v. Harden*, 92 Ga. 230.

<sup>1</sup> See *McInerney v. Beck*, 10 Wash. 515; *Spaulding v. Bradley*, 79 Cal. 449.

<sup>2</sup> *Oliver v. Piatt*, 3 How. 333. See, also, *May v. Le Claire*, 11 Wall. 217, 232; *Villa v. Rodriguez*, 12 Wall. 323; *Van Rensselaer v. Kearney*, 11 How. 297; *Hanrick v. Patrick*, 119 U. S. 58; *Gest v. Packwood*, 34 Fed. Rep. 368; *Hastings v. Nissen*, 31 Fed. Rep. 597; *Woodward v. Jewell*, 25 Fed. Rep. 6; *Baker v. Humphrey*, 101 U. S. 494; *Dickerson v. Colgrove*, 100 U. S. 578. And see, also, *White v. McGarry*, 2 Flip. 572.

in more recent cases this rule seems no longer to be recognized, and it is said by Mr. Justice Field: "The character of a *bona fide* purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though we think, inadvertently said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property, or a clear title, must depend upon the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the *bona fide* nature of the transaction on his part.<sup>1</sup> In Iowa the rule stated by the court

<sup>1</sup> *Moelle v. Sherwood*, 148 U. S. 21, 30. In *United States v. California and Oregon Land Co.*, 148 U. S. 31, 45, Mr. Justice Brewer said: "As against these evidences and conclusions of good faith, but a single proposition is raised, one upon which the dissenting judge in the circuit court of appeals rested his opinion, and that is the proposition that the conveyances from the road company were only quitclaim deeds, and that a purchaser holding under such a deed cannot be a *bona fide* purchaser; and in support of this proposition reference is made to the following cases in this court: *Oliver v. Piatt*, 3 How. 333, 410; *Van Rensselaer v. Kearney*, 11 How. 297; *May v. Le Olair*, 11 Wall. 217, 232; *Villa v. Rodriguez*, 12 Wall. 323; *Dickerson v. Colgrove*, 100 U. S. 578; *Baker v. Humphrey*, 101 U. S. 594; *Hanrick v. Patrick*, 109 U. S. 156. The argument briefly stated is that he who will give only a quitclaim deed in effect notifies his vendee that there is some defect in his title, and the latter taking with such notice, takes at his peril. It must be confessed that there are expressions in the opinions in the cases referred to which go to the full length of this proposition. Thus, in *Baker v. Humphrey*, 101 U. S. 494, 499, Mr. Justice Swayne, in delivering the opinion of the court, uses this language: 'Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation.' Yet it may be remarked that in none of these cases was it necessary to go to the full extent of denying absolutely that a party taking a quitclaim deed could be a *bona fide* purchaser; and in the later case of *McDonald v. Belding*, 145 U. S. 492, it was held, in a case coming from Arkansas, and in harmony with the rulings of the supreme court of that State, that while ordinarily a person holding under a quitclaim deed may be presumed to have had knowledge of imperfections in his vendor's title, yet that the rule was not universal, and that one might become a *bona fide* purchaser for value although holding under a deed of

is: "One holding title under such a deed is not to be regarded as a *bona fide* purchaser without notice of equities held by others."<sup>1</sup> But language to a contrary effect is found in a previous decision in that State.<sup>2</sup> The court, however, subsequently claimed that in that case the question was not presented, and that the only point decided was that, under the recording laws, a purchaser under a quitclaim deed acquired a prior right to one claiming under an unrecorded bond for a deed of which he had no notice, because the quitclaim deed conveyed the legal title.<sup>3</sup> In Minnesota, the statute declared that: "A deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale." Commenting upon this language, the court said: "If the legislature intended by the use of the term 'lawfully convey,' to limit the estate conveyed to such as the grantor had a legal right to convey, then, as he may not lawfully convey land which he has already conveyed to another, but may release any real or fancied interest remaining in him, nothing passes beyond his actual interest at the time of the conveyance, whatever that may be. When, therefore, a person relies on a mere quitclaim of the interest which a party may have in property, he does so at his peril, and must see to it, that there is an interest to convey. He is presumed to know what he is purchasing, and takes his

that kind; and in that case the grantee so holding was protected as a *bona fide* purchaser; while in the case of *Moelle v. Sherwood*, just decided, *ante*, 21, the general question was examined, and it was held that the receipt of a quitclaim deed does not of itself prevent a party from becoming a *bona fide* holder, and the expressions to the contrary, in previous opinions, were distinctly affirmed."

<sup>1</sup> *Watson v. Phelps*, 40 Iowa, 482, 483; *Raymond v. Morrison*, 59 Iowa, 371; *Smith v. Dunton*, 42 Iowa, 48; *Springer v. Bartle*, 46 Iowa, 688; *Besore v. Dosh*, 43 Iowa, 211, 212; *Pastel v. Palmer*, 71 Iowa, 157; 32 N. W. Rep. 257; *Butler v. Barkley*, 61 Iowa, 49; 25 N. W. Rep. 747; *Steele v. Sioux Valley Bank*, 79 Iowa, 339; 18 Am. St. Rep. 370; *Light v. West*, 42 Iowa, 138; *Pleasants v. Blodgett*, 39 Neb. 741; 42 Am. St. Rep. 624.

<sup>2</sup> *Pettingill v. Devin*, 35 Iowa, 353.

<sup>3</sup> *Springer v. Bartle*, 46 Iowa, 690. And see, also, *Steele v. Sioux Valley Bank*, 79 Iowa, 339; 18 Am. St. Rep. 370.

own risk.”<sup>1</sup> And hence in that State, a purchaser under a quitclaim deed is not regarded as a purchaser entitled to the benefits of the registration acts.<sup>2</sup> But the statute in that State has been changed, and a purchaser under a quitclaim deed is regarded as a *bona fide* purchaser.<sup>3</sup> This is also the rule in Missouri,<sup>4</sup> Texas,<sup>5</sup> and Alabama.<sup>6</sup>

**§ 672. View that such purchaser is entitled to the full protection of the recording laws.**—But in other States, and more reasonably, as it seems to us, it is held that a purchaser under a quitclaim deed who becomes such in good faith and for a valuable consideration, may claim the benefit of the recording laws, and that his conveyance, if first recorded, will prevail over a prior deed of bargain and sale. This is the rule adopted in California. In that State, Mr. Justice Belcher said: “There can be no doubt upon the question presented, if real

<sup>1</sup> *Martin v. Brown*, 4 Minn. 232, 292, per Emmett, C. J.

<sup>2</sup> *Marshall v. Roberts*, 18 Minn. 405; 10 Am. Rep. 201; *Everest v. Ferris*, 16 Minn. 26. See, also, *Hope v. Stone*, 10 Minn. 152.

<sup>3</sup> *Strong v. Lynn*, 38 Minn. 315; 37 N. W. Rep. 448; *Prentice v. Duluth Storage Co.*, 58 Fed. Rep. 437.

<sup>4</sup> *Stoffel v. Schroeder*, 62 Mo. 147; *Ridgeway v. Holliday*, 59 Mo. 444.

<sup>5</sup> *Rodgers v. Burchard*, 34 Tex. 441; 7 Am. Rep. 283; *Graham v. Hawkins*, 38 Tex. 628; *Richardson v. Levi*, 67 Tex. 359; 3 S. W. Rep. 444; *Harrison v. Boring*, 44 Tex. 255; *Fletcher v. Ellison*, 1 Tex. Civ. Cas. 661; *Thoon v. Newsom*, 64 Tex. 161; 53 Am. Rep. 747; *Taylor v. Harrison*, 47 Tex. 454; 26 Am. Rep. 304.

<sup>6</sup> *Smith's Heirs v. Bank of Mobile*, 21 Ala. 125; *Walker v. Miller*, 11 Ala. 1067, 1082, 1084; *Barclift v. Lillie*, 82 Ala. 319; 2 So. Rep. 120; *Derrick v. Brown*, 66 Ala. 162; *O'Neal v. Seixas*, 85 Ala. 80; 4 So. Rep. 745. See, also, *Bragg v. Paulk*, 42 Me. 502; *Boon v. Chiles*, 10 Peters, 177; *Vattier v. Hinde*, 7 Peters, 252; *Nash v. Bean*, 74 Me. 340. See, also, *Peters v. Cartier*, 80 Mich. 124; 20 Am. St. Rep. 508; *Eaton v. Trowbridge*, 38 Mich. 454; *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243; *Utley v. Fee*, 33 Kan. 683; *Merrill v. Hutchinson*, 45 Kan. 59; 23 Am. St. Rep. 713; *Hutchinson v. Hartman*, 15 Kan. 133; *Young v. Clippingier*, 14 Kan. 148; *Goddard v. Donaha*, 42 Kan. 754; *Hoyt v. Schuyler*, 19 Neb. 652; *Gress v. Evans*, 1 Dak. 387; 46 N. W. Rep. 1132; *Snow v. Lake*, 20 Fla. 656; 51 Am. Rep. 625; *McAdow v. Black*, 6 Mont. 601; 13 Pac. Rep. 377; *American Mortgage Co. v. Hutchinson*, 19 Or. 334; *Baker v. Woodward*, 12 Or. 3; *Bragg v. Paulk*, 42 Me. 502; *Meikel v. Borders*, 129 Ind. 529; *Leland v. Isenbeck*, 1 Idaho, 469; *Parker v. Randolph*, 5 S. D. 549; 59 N. W. Rep. 722.



estate, or an interest in real estate, can be aliened or assigned by a quitclaim deed. To alien or alienate means simply to convey or transfer title to another. In this State, from the earliest times, quitclaim deeds have been in every-day use for the purpose of transferring title to land, and have been considered as effectual for that purpose as deeds of bargain and sale. It is true, they transfer only such interest as the seller then has, and do not purport to convey the property in fee simple absolute, so as to pass an after-acquired title, but to the extent the seller has an interest, they divest him of it and vest it in the purchaser. We consider, therefore, that a quitclaim deed received in good faith and for a valuable consideration, which is first recorded, will prevail over a deed of older execution which is subsequently recorded.”<sup>1</sup> This view was also at an early day adopted in Illinois. “Prior to the passage of the statutes made for the purpose of facilitating the manner of transferring lands, it was essential to the operation of a deed of release that the grantee should have some estate or interest in the land released; but many of the subtle distinctions and ceremonious forms peculiar to the ancient modes of transferring titles are abolished, and the policy of the law now requires that we should look rather to the intention of

<sup>1</sup> In *Graff v. Middleton*, 43 Cal. 341. This case was subsequently approved in *Frey v. Clifford*, 44 Cal. 335, 343. See, also, *Willingham v. Hardin*, 75 Mo. 429; *Boogher v. Neece*, 75 Mo. 383. In the case of *Alison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89, the court while recognizing the rule stated as the correct principle in view of the language of the recording act in force when the cases were decided, says: “Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described.” In that case the court held that a quitclaim deed conveyed to the purchaser only what the grantor could himself claim, and that the only exceptions to the rule were based upon the registry laws, or were sales made under execution. See, also, *Spaulding v. Bradley*, 79 Cal. 449; *Thompson v. Spencer*, 50 Cal. 532; *Rego v. Van Pelt*, 65 Cal. 254.

the parties than to the form in which it is expressed. A deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect there is no distinction between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had been previously conveyed."<sup>1</sup> In a recent case in Mississippi, the cases are reviewed by Mr. Justice Campbell at considerable length, and as the result of his examination, he says: "We conclude that there is no *authority* for the proposition that a quitclaim deed in the chain of title deprives him who claims under it of the character of a *bona fide* purchaser. There are *dicta* and suggestions and inferences to that effect. But we deny and repudiate the proposition as unsound and insupportable on authority, principle, or policy. We concede that under some circumstances a quitclaim deed may be a 'significant circumstance,' in the consideration of a combination of circumstances of which it may be a part, but this is the greatest force it can possibly have in any case."<sup>2</sup> The rule that a purchaser under a quitclaim

<sup>1</sup> *McConnel v. Reed*, 4 Scam. (5 Ill.) 117, 121; 38 Am. Dec. 124, per Chief Justice Wilson. And to the same effect see *Brown v. Banner Coal and Oil Co.*, 97 Ill. 214; 37 Am. Rep. 105; *Kennedy v. Northup*, 15 Ill. 148; *Morgan v. Clayton*, 61 Ill. 35; *Hamilton v. Doolittle*, 37 Ill. 473; *Harpham v. Little*, 59 Ill. 509; *Butterfield v. Smith*, 11 Ill. 485; *Brady v. Spurck*, 27 Ill. 478; *Grant v. Bennett*, 96 Ill. 513; *Fox v. Hall*, 74 Mo. 315; 41 Am. Rep. 316; *White v. McGarry*, 2 Flipp. C.C. 572. The title of a purchaser under a quitclaim deed without notice will prevail over that given by an unrecorded deed: *Merrill v. Hutchinson*, 45 Kan. 59; 23 Am. St. Rep. 713.

<sup>2</sup> *Chapman v. Sims*, 53 Miss. 163. The court, in that case, in discussing that question, said: "The deed from McPherson to Sims is a mere quitclaim deed, and it is said that, as there is such a deed in the chain of Anderson's title, he cannot be held to occupy the position of a *bona fide* purchaser. The cases cited in support of this legal proposition are: *Smith v. Winston*, 2 How. (Miss.) 601; *Kerr v. Freeman*, 33 Miss. 292; *Learned v. Corley*, 43 Miss. 687; *Oliver v. Piatt*, 3 How. 333, 410; *May*

deed is entitled to the character of a *bona fide* purchaser prevails in many States.<sup>1</sup>

*v. Le Claire*, 11 Wall. 217, 232; *Woodfolk v. Blount*, 3 Haww. (Tenn.) 147. In *Smith v. Winston*, the point under consideration was, whether the failure of consideration could be set up by a vendee under deed without covenants of warranty, as a defense to the recovery of the purchase money he had promised. It would seem that to suggest the question was to indicate the proper answer to it; but the learned judge delivering the opinion, discussed the question at length, and among many other things said: 'In a quitclaim deed, the party does nothing more than to acquit the grantee from any title or right of action which he may have; and the fact of taking nothing more than a quitclaim would, in general, imply a knowledge of doubtful title.' Again, he remarked: 'The law seems to be well settled that a purchaser without covenants takes all the risk of title.' The remark last quoted was pertinent, and all that was necessary to dispose of the point. It is indisputable that a purchaser without covenants takes all the risk of title, so far as any right to call on his vendor to indemnify him for a failure of title is involved. We are not able to perceive the appropriateness of the above-quoted statement, that 'the fact of taking nothing more than a quitclaim would, in general, imply a knowledge of doubtful title.' Knowledge, or want of it, could in no way affect the question being discussed. It was not the case of one claiming as a *bona fide* purchaser. That case is not an authority in support of the proposition for which it has been invoked. The case of *Kerr v. Freeman* is that of a complainant claiming land under a quitclaim deed, seeking the cancellation of certain deeds operating as clouds on his title. The judge delivering the opinion, speaking of the complainant's quitclaim deed, said: 'His deed merely shows a doubtful title'; but it was not said that because the complainant held under a quitclaim, he could not maintain his bill. On the contrary the question, 'whether the decree is sustained by the evidence in the cause,' was minutely discussed, and the conclusion announced that it was insufficient to warrant the decree. If it be true, as a legal proposition, that a title evidenced only by a quitclaim deed is not sufficient to support a claim to have clouds removed from it,

<sup>1</sup> *Woodward v. Sartwell*, 129 Mass. 210; *Dow v. Whitney*, 147 Mass. 1; *Mansfield v. Dyer*, 131 Mass. 200; *Kyle v. Kavanagh*, 103 Mass. 356; 4 Am. Rep. 560; *Cutler v. James*, 64 Wis. 173; 54 Am. Rep. 603; *Farrason v. Edrington*, 49 Ark. 207; *Munson v. Ensor*, 94 Mo. 504; *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366; *Craig v. Zimmerman*, 87 Mo. 475; 56 Am. Rep. 466; *Ebersole v. Rankin*, 102 Mo. 488; *Eoff v. Irvine*, 108 Mo. 378; 32 Am. St. Rep. 609; *Ely v. Stannard*, 44 Conn. 528; *Potter v. Tuttle*, 22 Conn. 512; *Bradbury v. Davis*, 5 Colo. 285. In some cases the fact that a purchaser has taken a quitclaim deed has been considered a circumstance tending to show notice on his part: *Gaines v. Summers*, 50 Ark. 322; *Bagley v. Fletcher*, 44 Ark. 153; *Miller v. Fralley*, 23 Ark. 785.

§ 673. **Comments.**—We think that it is unreasonable to deprive a purchaser under a quitclaim deed of the

the announcement of that proposition was enough to dispose of the case, and render an examination of the evidence unnecessary. This case is not an authority for the proposition that a vendee by quitclaim cannot be regarded as a *bona fide* purchaser. Learned v. Corley contains this expression: 'A quitclaim deed implies a doubtful title.' But that was not pronounced sufficient, of itself, to deprive the grantee of his claim to be a *bona fide* purchaser. It seems, rather, to have been treated as a significant circumstance in the history of the case fit to be considered, with other circumstances, all of which combined were held to deprive the holder of his claim as a purchaser in good faith. In Oliver v. Piatt, this language is found: "Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him, accordingly, were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest in the property; and under such circumstances it is difficult to conceive how he can claim protection as a *bona fide* purchaser,' etc. It is observable that the quitclaim deed, in pursuance of a previous stipulation for such a one, was declared to be a 'significant circumstance,' in connection with others, in themselves sufficient, to deprive the grantee of his claim to be treated as a *bona fide* purchaser. The quitclaim deed is not pronounced to be *per se* enough to rob its holder of the character of a *bona fide* purchaser. In May v. Le Claire this language is used: The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases, the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey.' And Oliver v. Piatt, 3 How. 333, is referred to in support of the proposition. No other authority is cited. After declaring 'that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title,' it was surely unnecessary to say more, and the remark about the quitclaim deed is as perfect a specimen of an *obiter dictum* as the books afford. We have above shown that the single case cited in support of this *dictum* merely treated the quitclaim in that case as a 'significant circumstance,' and did not announce that it alone was in itself a bar to the claim to be a *bona fide* purchaser. In Woodfolk v. Blount, the court hesitatingly and doubtfully suggested that, perhaps 'the vendee in all cases, when he receives but a special warranty or quitclaim conveyance, takes the estate subject to all the disadvantages that it was liable to in the hands of the vendor, and the law will presume notice of all encumbrances, either legal or equitable. The circumstance of a vendor refusing to make a full and ordinary assurance is sufficient to excite suspicion, and put the party upon inquiry.' Not a single authority is referred to, except cases on the subject of 'in-

benefits of the registration laws. A conveyance of this character is sufficient to convey all the title the grantor possesses at the time of its execution. If he has already executed a prior conveyance, a subsequent grantee, whether by a quitclaim deed, or a deed containing every covenant, can acquire no title unless it be by virtue of some principle of estoppel, or by force of some positive provision of the statute, relative to registration. There is, to our mind, no force in the argument that a purchaser by a quitclaim deed can succeed to no rights save those possessed by his grantor. The same is true of a purchaser under any other kind of a deed. The latter succeeds by the conveyance only to the title of the grantor, although he may be entitled to the benefit of the subsequent title of his grantor by operation of the doctrine of estoppel, and may have a right to resort to his grantor on the covenants contained in the deed for any breach of or defect in the title he has purchased. Nor should the fact that a purchaser accepts a quitclaim be regarded, in our judgment, as a "significant circumstance," in charging him with notice of a prior or paramount title. Mr. Rawle very properly says with reference to this suggestion: "But there would appear to be equal reason for the opposite argument, that a deed with general warranty was as significant a circumstance—that unless there had been something wrong about the title, the purchaser would not have demanded a general covenant, and that he intended to run the risk of the defect, and rely upon the covenant for his protection. In the absence of local usage it would seem that no presumption of notice can properly arise, either from

dorsement of a bill without recourse after it is due,' which hold that the indorsee takes subject to all equities. The language immediately afterward used in the opinion is: 'The principles in relation to conveyances of real property with special warranty, perhaps, will be found equally applicable. However, it is not necessary to give a positive opinion on this subject.' It is just to assume that the judge delivering that opinion would have cited some text-book or adjudication, if he could have found one to sustain the view he expressed. His citation of cases of indorsements of bills after maturity shows his anxiety on the subject, and suggests his inability to find any authority in point."

the absence or presence of unlimited covenants, and where it is, as some of the cases say, the invariable usage in a State to insert general covenants, the presence in the deed of limited covenants is only a ground of presumption of mutual knowledge, or at least, of suspicion, of some defect of title."<sup>1</sup> The theory of the registry laws is that the records truly disclose the state of every title. If an intending purchaser, after a careful examination of the records, finds the legal title lodged in his grantor, and has no actual notice of any outstanding claim, and obtains all of his grantor's interest, why should his right to precedence over a prior unrecorded conveyance of which he had no notice depend upon the form of his deed? Quitclaim deeds in many States are not unusual forms of conveyance. The grantor may have the best of reasons for not desiring to execute a deed with covenants, or even to agree, impliedly, that the grantee shall succeed to any title the former may subsequently acquire. The grantee may be thoroughly satisfied with the validity of the grantor's title, and may, in his confidence, consider himself fully protected by acquiring that title without the exaction of covenants for his reparation in case of its failure. The fact that his deed contains no covenants, and that the grantor conveys to him nothing but his title, should not, in our opinion, be entitled to consideration in the determination of the question whether he is to be regarded as a *bona fide* purchaser or not. This question should be decided with reference to other considerations, as want of consideration or purchase with notice. It might, perhaps, as a question of evidence, on the issue of notice, be conceded that a party should be permitted to show, that one of the *reasons* why the grantee took a quitclaim deed was because both he and the grantor were aware of a prior conveyance, or a defect in the title. But, as we have

<sup>1</sup> Rawle on Covenants (4th ed.) 35, 36, citing *Miller v. Fraley*, 23 Ark. 748; *Lowry v. Brown*, 1 Cold. 459. That the taking of a quitclaim deed may be a circumstance bearing on the question of notice, see *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295; *Mansfield v. Dyer*, 131 Mass. 200.



stated, we can see no reason for the doctrine that a quitclaim deed should, of itself, aside from any other suspicious circumstance, be sufficient to deprive its holder of occupying the character of a *bona fide* purchaser.

§ 674. **Intention in quitclaim to pass grantor's interest only.**—But even in the States where a quitclaim deed is recognized as an effectual mode of transferring the title of the grantor, and is accorded the same privileges under the registry law as a deed of bargain and sale, yet if it appears by the deed of quitclaim that the grantor intended to convey only such land as he owned at the time of its execution, the lands embraced in a prior operative conveyance are reserved from the operation of the quitclaim deed, and title to such previously conveyed lands will not pass by the deed of quitclaim, notwithstanding that the prior deed remains unrecorded. As an illustration of this principle a case may be cited where the description of the property intended to be conveyed by the quitclaim deed was: "All lots, blocks, lands, and fractional blocks, or any interest therein, in the town of Pekin, county of Tazewell, State of Illinois, that I have; also, all my right and interest, or in anywise appertaining, together with the right of ways. This deed is intended to convey all the interest the said Peter Menard has in the town of Pekin, now city, in said county." The court held that this language embraced only such land as the grantor owned at the time of the execution of the deed.<sup>1</sup> The court said: "The language used clearly manifests the intention of the grantor to limit the operation of the conveyance to such lands as he then owned, and the title to which was still in him. Whilst a quitclaim deed is as effectual to pass title as a deed of bargain and sale, still it, like all other contracts and agreements, must be expounded and enforced according to the intention of the parties. In this deed the intention of Menard appears to have been to sell such lands

<sup>1</sup> *Hamilton v. Doolittle*, 37 Ill. 473. See, also, *Pleasants v. Blodgett*, 39 Neb. 741; 42 Am. St. Rep. 624; 58 N. W. Rep. 423.



only as had not been conveyed by him to other parties previous to that time.”<sup>1</sup> A grantor conveyed land, specifically describing himself as the devisee of Alexander Skinner, by whom the land was owned in his lifetime. By a subsequent deed, which was first recorded, he conveyed to another “all the right, title, and claim which he, the said Alexander Skinner, *had*, and all the right, title, and interest which the said Lee [grantor] holds as legatee and representative to said Alexander Skinner, deceased, of all lands lying and being in the State of Kentucky, which cannot at this time be particularly described, whether they be by deed, patent, mortgage, survey, location, contract, or otherwise.” The deed also contained a covenant against all persons claiming under the grantor, his heirs and assigns. The court held that the latter conveyance operated only upon the lands and the interest which he possessed at its execution, and therefore could not, by a prior registration, obtain precedence over or defeat the operation of the first deed, by which the same land was specifically conveyed.<sup>2</sup>

<sup>1</sup> Chief Justice Walker, in *Hamilton v. Doolittle*, *supra*.

<sup>2</sup> *Brown v. Jackson*, 3 Wheat. 449. Mr. Justice Todd delivered the opinion of the court, and said: “A conveyance of the *right, title, and interest* in land is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance; but it passes no estate which was not then possessed by the party. If the deed to Banks had stopped after the words ‘all the right, title, and claim which Alexander Skinner had,’ there might be strong ground to contend that it embraced all the lands to which Alexander Skinner had any right, title, or claim, at the time of his death, and thus have included the lands in controversy. But the court is of the opinion that those words are qualified by the succeeding clause, which limits the conveyance to the *right, title, and claim* which Alexander Skinner had at the time of his decease, and which Lee also *held at the time of his conveyance*, and coupling both clauses together, the conveyance operated only upon lands, the right, title, and interest of which was then in Lee, and which he derived from Skinner. This construction is, in the opinion of the court, a reasonable one, founded on the apparent intent of the parties, and corroborated by the terms of the covenant of warranty. Upon any other construction, the deed must be deemed a fraud upon the prior purchaser; but in this way both deeds may well stand together consistent with the innocence of all parties.” A general covenant of warranty is limited by words conveying only the right, title, and inter-

§ 675. **Another illustration.**—The same construction was given to another deed, which was in the usual form of a quitclaim deed, conveying all the right, title, and interest of the grantor in certain lands, but after the description contained the clause: "Intending to convey such only as are now owned by said Walker, and not any that may have been conveyed to anyone else." "Such a deed," said Mr. Justice Trumbull, "is just as effectual for the purpose of transferring real estate as a deed of bargain and sale; and had there been no words in the deed under consideration, showing an intention on the part of the grantor not to convey the land in question, there can be no doubt that the plaintiff would have been entitled to recover. The deed, however, contains a clause showing that the grantor did not transfer by it any interest in lands which he had previously conveyed. It was competent for the grantor to insert such a limitation in the deed; and the grantee, by accepting such a deed, is bound by all the limitations it contains. The intention of the parties is the polar star by which courts are always to be guided in the construction of contracts; and can there be any question that Walker did not intend by his quitclaim deed to convey any land which he did not then own, or which might have been conveyed to anyone else, when he has expressed that intention in the deed itself, as clearly as language could make it? It is clear, therefore, that no interest in the land in question passed by the quitclaim deed, because Walker had previously conveyed the same land to Taylor and others. He says that it was his intention to convey only such lands described in the quitclaim deed as he then owned, and his ownership over the land in controversy was as effectually parted with, as to him, as it would have been if Taylor and others had immediately placed their deed upon record. To construe the clause under considera-

est of the grantor: *Reynolds v. Shaver*, 59 Ark. 299; 43 Am. St. Rep. 36; *Hull v. Hull*, 35 W. Va. 155; 29 Am. St. Rep. 800. See, also, § 27, *ante*, and § 931, *post*.

tion as extending only to such lands as Walker had previously conveyed to persons who had put their deeds upon record, would be to give it no meaning whatever. His second conveyance could in no way affect their rights. It is probable that Walker, being at the time a large operator in lands, did not precisely recollect what tracts he had sold, and hence inserted a clause in his quitclaim deed that would protect all who had purchased from him, whether their deeds were recorded or not, even though he should make a second conveyance of the same land.”<sup>1</sup>

§ 676. **Reservation in quitclaim deed as affecting a prior void or voidable deed.**—But although a quitclaim deed may show by proper words of reservation that the grantor did not intend to convey lands previously transferred by him, yet it is held that a prior void deed is not within such a reservation, and that a subsequent quitclaim deed, with a reservation of this nature, will pass the title as against the prior conveyance.<sup>2</sup> “By fair construction, the language must be restricted to previous conveyances, legally executed, and operative as such. A conveyance void under the law, or even voidable, at the time of executing the subsequent conveyance, could not be held to be embraced within the reservation. It not unfrequently happens, that the subsequent deed is designed to avoid a prior deed which the grantor has the legal right to avoid, and such conveyances are upheld as binding, and sufficient to pass the title. Again, the language should be restricted so as not to embrace any conveyance which is so imperfectly executed that the law will refuse to give it effect as a conveyance of title. If it has been so executed that it cannot be proved so as to be admitted in evidence as a conveyance, it cannot have effect, and cannot be held to constitute a conveyance. If, from want of proof, or from other defect, it cannot be

<sup>1</sup> *Butterfield v. Smith*, 11 Ill. 485, 486. See *Harpham v. Little*, 59 Ill. 509; *Allison v. Thomas*, 72 Cal. 562; *Coe v. Persons Unknown*, 43 Me. 432; *Nash v. Bean*, 74 Me. 340; *Walker v. Lincoln*, 45 Me. 67.

<sup>2</sup> *Hamilton v. Doolittle*, 37 Ill. 473.

used in the assertion of the right to hold the title, it cannot be said to be a conveyance of the title to the land. In such a case, the legal title does not pass from the vendor, but remains in him at the time the subsequent conveyance is made, and falls fully within the operation of the language of such a deed."<sup>1</sup>

§ 677. **Record partly printed.** — The law is satisfied if the record contains a true copy of the instrument to be recorded. The record of a conveyance is not defective, because, instead of being entirely written, a portion of it is printed. The statute of Wisconsin requires that instruments shall be recorded "in a plain and distinct handwriting."<sup>2</sup> A book in which a mortgage was recorded was composed of printed blanks in the form of farm mortgages. When a mortgage of this kind was recorded, the blanks were filled in, and this was the only handwriting shown by the record. It was declared by statute in that State that "the words 'written' and 'in writing,' may be construed to include printing, lithographing, and any other mode of representing words and letters."<sup>3</sup> The court held that the objection that a part of the record was printed was invalid.<sup>4</sup> "There is no claim that this copy of the record was not complete and perfect. We cannot hold that this record is defective because a portion of it is printed. Certainly a printed record is as effective to protect *bona fide* purchasers as one wholly in writing. It is also just as beneficial to parties and those in privity with them. The objects of the recording acts are as fully complied with by a printed as by a written record. There is no question but that the book in which

<sup>1</sup> *Hamilton v. Doolittle*, *supra*. A quitclaim deed will not cut off equities arising from transactions not required to be in writing or recorded: *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366; *Mann v. Best*, 62 Mo. 497; *Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Mo. 147; *Munson v. Ensor*, 94 Mo. 506.

<sup>2</sup> Rev. Stats. § 758, subd. 2.

<sup>3</sup> Rev. Stats. § 4971, subd. 19.

<sup>4</sup> *Maxwell v. Hartmann*, 50 Wis. 660.

the record was made was a part of the public records in the register's office of Ozaukee county."<sup>1</sup>

**§ 678. Interest of recording officer.**—The registration of a deed is purely a ministerial act. The record is not vitiated by the fact that the clerk by whom it is recorded is a party to the instrument.<sup>2</sup>

**§ 679. Time at which deed is held to be recorded.**—The statute may prescribe that the depositing of a deed within a specified period shall have a retroactive effect, so that its registration may, when it is filed within this limited time, relate back to the time of its execution. In many States it is expressly provided that a deed is considered as recorded at the time it is filed for record. In the absence of legislation on the subject, it is generally conceded, so far as the question of priority and kindred questions are concerned, that a deed is considered in law to be recorded at the time at which it is deposited with the proper officer for registration.<sup>3</sup> "When a deed," said

<sup>1</sup> Mr. Justice Cassoday, in *Maxwell v. Hartmann*, *supra*.

<sup>2</sup> *Brockenborough v. Melton*, 55 Tex. 493; *Tessier v. Hall*, 7 Mart. (La.) 411.

<sup>3</sup> Cal. Civil Code, § 1170; *Kesler v. State*, 24 Ind. 315; *Harrold v. Simonds*, 9 Mo. 326; *Mallory v. Stodder*, 6 Ala. 801; *Poplin v. Mundell*, 27 Kan. 138; *Dubose v. Young*, 10 Ala. 365; *Horsley v. Garth*, 2 Gratt. 471; 44 Am. Dec. 393; *Deming v. Miles*, 35 Neb. 739; 37 Am. St. Rep. 464; *Perkins v. Strong*, 22 Neb. 725; *Sinclair v. Slawson*, 44 Mich. 123; 38 Am. Rep. 235; *Leslie v. Hinson*, 83 Ala. 266; *Bloom v. Noggle*, 4 Ohio St. 45; *Brown v. Kirkman*, 1 Ohio St. 116; *Tousley v. Tousley*, 5 Ohio St. 78; *Fosdick v. Barr*, 3 Ohio St. 471; *Mayham v. Coombs*, 14 Ohio, 428; *Magee v. Beatty*, 8 Ohio, 396; *Bercaw v. Cockerill*, 20 Ohio St. 163; *Throckmorton v. Price*, 28 Tex. 605; *Belbaze v. Ratto*, 69 Tex. 36; *Harrison v. McMurray*, 71 Tex. 122; *Gladding v. Frick*, 88 Pa. St. 460; *Brooke's Appeal*, 64 Pa. St. 127; *Clader v. Thomas*, 89 Pa. St. 343; *Watkins v. Wilhoit*, 104 Cal. 395; *Parker v. Scott*, 64 N. C. 118; *Metts v. Bright*, 4 Dev. & B. 173; 32 Am. Dec. 683; *Davis v. Whitaker*, 114 N. C. 279; 41 Am. St. Rep. 793; *Oaks v. Walls*, 28 Ark. 244; *Lee v. Birmingham*, 30 Kan. 312; *Kiser v. Heuston*, 38 Ill. 252; *Brown v. Banner Coal & Oil Co.*, 97 Ill. 214; 37 Am. Rep. 105; *Merrick v. Wallace*, 19 Ill. 486; *Naltinger v. Ware*, 41 Ill. 245; *Haworth v. Taylor*, 108 Ill. 275; *Bedford v. Tupper*, 30 Hun, 174; *Simonson v. Falihee*, 25 Hun, 570; *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257; *Lewis v. Hinman*, 56 Conn. 55; *Franklin v. Cannon*, 1 Root, 500; *Bishop v. Schneider*, 46 Mo. 472;

the Supreme Court of Rhode Island, "which has never been recorded, is lodged with a town clerk, the act of lodging it, unaccompanied with any counter declarations, is itself an implied direction to record; and, other things equal, the title is complete upon its being lodged with such implied directions; for, by the terms of our statute, the lodging of a deed to be recorded is equivalent to an actual entry of it upon the record, so far forth as is necessary to perfect the title. The title being made complete by such lodgment, the subsequent neglect of the town clerk cannot affect the grantee's rights under the deed. The deed remaining on file in the clerk's office and open to inspection, is notice to all the world of a conveyance of the land, either absolute or conditional."<sup>1</sup> A deed that has been so filed for record, is sufficient to charge subsequent purchasers with constructive notice from that time of its existence and execution, and is, of course, entitled to priority over any other deed subsequently filed for record.<sup>2</sup>

<sup>2</sup> Am. Dec. 533; *Heidson v. Randolph*, 66 Fed. Rep. 216; 13 C. C. A. 402; *Mangold v. Barrow*, 61 Miss. 593; 48 Am. Rep. 84; *Jacobs v. Denison*, 141 Mass. 117; *Gillespie v. Rogers*, 146 Mass. 610. When a deed has been deposited with the proper custodian, at the right time and place, a party's duty to file a paper has been performed: *Hook v. Fender*, 18 Col. 283; 36 Am. St. Rep. 277; *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 288.

<sup>1</sup> *Nichols v. Reynolds*, 1 R. I. 30, 35; 36 Am. Dec. 238. See, also, *Gide v. Fauntleroy*, 8 Mon. B. 177; *Horsley v. Garth*, 2 Gratt. 471; 44 Am. Dec. 393.

<sup>2</sup> *Bigelow v. Topliff*, 25 Vt. 274; 60 Am. Dec. 264. In that case, *Isham, J.*, in delivering the opinion of the court, said: "What will be a sufficient record for that purpose, depends upon the object and general provisions of the act. In some cases, the instrument must be recorded at length upon the book of records, and it will have no effect until it is so recorded. This is true in all cases where the enrollment is necessary to the investing of the title. In such case, it is made a condition precedent, and no right or title passes until the statute is strictly complied with. This rule prevails where recording is required of the proceedings of the collector in sales of land for taxes: *Clark v. Tucker*, 6 Vt. 181; *Giddings v. Smith*, 15 Vt. 344. So, in the levy of executions upon real estate, the record of the execution and levy is necessary to pass the title: *Morton v. Edwin*, 19 Vt. 81. In these cases, the object of the record is not simply notice, but it is an essential link in the chain of evidence in the proof of title to the estate. Where the object of the record is notice, merely, the statute is complied with when the party has left the instru-

**§ 680: Mistake of copying deed in record—Conflicting views.** — A deed may be executed in every particular as required by law, may be properly acknowledged, de-

ment with the recording officer for that purpose, with directions for its immediate record. This construction is not to be considered as an open question, but as settled by the decisions of this court, as well as by that practical construction which it has received since the passage of the act. This principle was recognized by this court in the case of *Ferris v. Smith*, 24 Vt. 27. In that case, the act required 'the deputation and certificate of the oath of office of a deputy sheriff to be recorded in the county clerk's office, and, until recorded, the official acts of such deputy were not valid.' The object of the act was notice, and lodging that deputation and certificate with the county clerk for record, was held a sufficient compliance with the act to invest him with the prerogatives of the office, and render valid his official acts, though the deputation and certificate had not been recorded *in extenso* upon the records. In Connecticut, the same rule prevails, and leaving the deed for record with the certificate of the clerk thereon, that it was so left is sufficient to protect the title as against the grantor, as well as subsequent purchasers and creditors: *Hine v. Roberts*, 8 Conn. 347. The difference in phraseology between our statute and theirs is not such as to justify a different construction, particularly where the practical construction of the act has been uniformly the same." Chancellor Kent, in a note to his Commentaries, says: "The statute of New York gives priority to the conveyance which 'shall be first duly recorded'; but it adds that it shall be 'considered as recorded from the time of the delivery to the clerk for that purpose.' A provision to the same effect is in the Massachusetts Revised Statutes for 1836, though no doubt the previously existing rule of law was the same. This prevents the question which Mr. Bell says has arisen in Scotland, between a sasine first transcribed, though last presented, and a sasine, which, by the minute-book, is proved to have been first presented, though last transcribed. He admits, however, the better construction of the statute to be that the minute-book of the time of the presentation of the instrument was intended to be the regulator of the order of preference by priority: 1 Bell's Com. 679"; 4 Kent's Com. (12th ed.), star page 459. In *Ferris v. Smith*, 24 Vt. 27, 32, the court said, with reference to conveyances, where the title is passed or the right acquired by act of the parties, as in the conveyance of real estate by deed, that "though a record is necessary in order to give full effect to the transaction for collateral purposes, it is made so as the medium of general notice. And, as a public recording office is a place where all persons have the right to apply for information, as well in regard to instruments lodged there for record as to the records already made, the act of the party in lodging the evidence of his title in such an office, for the *bona fide* purpose of having it recorded without delay, and the reception of it by the recording officer for the same purpose, are held to operate like the record itself as notice to third persons. In other words, the deed or instrument thus deposited and received is deemed to be of record



posited with the proper officer for registration, yet may not be correctly copied by the recording officer into the record-books. In such a case, a searcher of the records is compelled to assume that the information they contain is true. He rarely has an opportunity to inspect the original deed, and even if he has such an opportunity, deems an inspection of the original unnecessary. At the same time, the person who has recorded his conveyance has done all in his power to secure a proper registration. If a mistake is made in the copying of the deeds, the fault is not his. A very interesting question arises when a mistake has been made by the officer in spreading the deed on the record. Shall the purchaser who acted in good faith and acquired his rights in the honest belief that the records correctly showed the various claims upon the property, suffer because the officer failed to do his duty, or shall the person who presented his conveyance for registration bear the consequences of the officer's negligence? The decisions are contradictory on this question. On one side it is asserted that the person who files a deed for record is not responsible for the officer's neglect, and on the other, it is declared with equal confidence that the records do not give notice of what they do not contain.

**§ 681. View that the grantee is not affected by mistake in copying the deed.**—On one hand, on the ground that a deed is considered as recorded, when it is left with the officer for the purpose of registration, it is held that by depositing the deed with the proper officer, the grantee has done all that is required of him, and although the officer records only a portion of the instrument, or omits to record it at all, the rights of the grantee cannot thereby be

or recorded: *Marbury v. Madison*, 1 U. S. Cond. R. 273, 274. This is on condition, to be sure, that a full and proper record be ultimately made, and that the party shall in no way interfere to prevent or delay the making it: *Sawyer & Rogers v. Adams*, 8 Vt. 172; 30 Am. Dec. 459." See, also, *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105.

injuriously affected.<sup>1</sup> A statute in Illinois provided that after a specified date "all deeds and other title papers which are required to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all subsequent creditors and purchasers without notice, and all such deeds and title papers shall be adjudged void, as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie." The recorder in recording a deed

<sup>1</sup> *Riggs v. Boylan*, 4 Biss. 445; *Polk v. Cosgrove*, 4 Biss. 437; *Marigold v. Barlow*, 61 Miss. 593; 48 Am. Rep. 84; *Kiser v. Houston*, 38 Ill. 252; *Bedford v. Tupper*, 30 Hun, 174; *Merrick v. Wallace*, 19 Ill. 486; *Wood's Appeal*, 82 Pa. St. 116; s. c. 13 Am. Law Reg. 255; *Flowers v. Wilkes*, 1 Swan, 408; *Lee v. Birmingham*, 30 Kan. 312; *Bank of Kentucky v. Haggins*, 1 Marsh. A. K. 306; *Brooke's Appeal*, 64 Pa. St. 127; *Nichols v. Reynolds*, 1 R. I. 30; 36 Am. Dec. 238; *Musser v. Hyde*, 2 Watts & S. 314; *Oats v. Walls*, 28 Ark. 244; *Mims v. Mims*, 35 Ala. 23; *Throckmorton v. Price*, 28 Tex. 605; 91 Am. Dec. 334; *Beverly v. Ellis*, 1 Rand. 202; *Board of Commrs. v. Babcock*, 5 Or. 472; *Case v. Hargadine*, 43 Ark. 144; *Nichols v. Reynolds*, 1 R. I. 30; 36 Am. Dec. 238; *Marlet v. Hinman*, 77 Wis. 136; 20 Am. St. Rep. 102; *Gillespie v. Rogers*, 146 Mass. 610; *Farnsworth v. Jordain*, 15 Gray, 517; *Tracy v. Jenks*, 15 Pick. 465; *Ames v. Phelps*, 18 Pick. 314; *Fuller v. Cunningham*, 105 Mass. 442; *Wood v. Simons*, 110 Mass. 116. See, also, *Poplin v. Mundell*, 27 Kan. 138; *Glad- ing v. Frick*, 88 Pa. St. 460; *Lignoski v. Crooker*, 86 Tex. 324; 24 S. W. Rep. 278; *Freiberg v. Magale*, 70 Tex. 116; 7 S. W. Rep. 684; *Woodson v. Allen*, 54 Tex. 551; *Converse v. Potter*, 45 N. H. 385; *Tousley v. Tousley*, 5 Ohio St. 78; *Brown v. Kirkman*, 1 Ohio St. 116; *Green v. Carrington*, 16 Ohio St. 548; 91 Am. Dec. 103; *Lewis v. Hinman*, 56 Conn. 55; 13 Atl. Rep. 143; *Hine v. Robbins*, 8 Conn. 342; *Franklin v. Cannon*, 1 Root, 500; *Watkins v. Wilhoit*, 104 Cal. 395; *Fouche v. Swain*, 80 Ala. 151; *Chatham v. Bradford*, 50 Ga. 327; 15 Am. Rep. 692; *Hiatt v. Callo- way*, 7 B. Mon. 178; *Bank v. Haggins*, 1 Marsh. A. K. 306; *Mutual Insur- ance Co. v. Dake*, 87 N. Y. 257; *Taylor v. Hotchkiss*, 2 La. Ann. 917; *Falconer's Succession*, 4 Rob. 5; *Payne v. Pavey*, 29 La. Ann. 116; *Swan v. Vogle*, 31 La. Ann. 38; *Swepson v. Bank*, 9 Lea, 713; *Woodward v. Boro*, 16 Lea, 678; *Mangold v. Barlow*, 61 Miss. 593; 48 Am. Rep. 84. When a deed is filed for record it operates as constructive notice, though the officer may fail to observe the requirements of the statute in relation to its recordation: *Deming v. Miles*, 35 Neb. 739; 37 Am. St. Rep. 464. See, also, *Perkins v. Strong*, 22 Neb. 725. See, also, *Franklin v. Cannon*, 1 Root, 500; *Hartmyer v. Gates*, 1 Root, 61; *Judd v. Woodruff*, 2 Root, 298; *McDonald v. Leach*, Kirby, 72; *McGregor v. Hill*, 3 Stewt. & P. 397. And see *Clader v. Thomas*, 89 Pa. St. 343; *Gaskill v. Badge*, 3 Lea (Tenn), 144.

misdescribed the premises in his record. The court held that the grantee performed his duty by leaving his deed for record with the proper officer; and the mistake in the record did not affect the question of notice given by filing the deed for record.<sup>1</sup> Commenting on the statute above quoted, Mr. Justice Breese said: "This was the law in force at the time of the execution of the deed to Hugunin, and under it, all the duty he had to perform to make it available against the world, was to place it with the recorder to be filed for record. Before that time it had effect only as against the grantors—after that time, it took effect and was in force against all persons. It is only by virtue of this law that the plaintiff can claim to postpone defendant's deed, and destroy its effect as against his purchase at the sheriff's sale. He is, in effect, claiming to enforce a statute penalty imposed upon the grantee in the deed, by reason of his having omitted to do something the law required him to do to protect himself and preserve his rights. The law never intended a grantee should suffer this forfeiture, if he has conformed to its provisions. The plaintiff claiming the benefit of this statute, being, as it is, in derogation of the common law, and conferring a right before unknown, he must find in the provisions of the statute itself, the letter which gives him that right. To the statute alone must we look for a purely statutory right. All that this law required of the grantee in the deed was that he should file his deed for record in the recorder's office, in order to secure his rights under the deed. When he does that, the requirements of the law are satisfied, and no right to claim this forfeiture can be set up by a subsequent purchaser. The statute does not give to the subsequent purchaser the right to have the first deed postponed to his, if the deed is not actually recorded, but only if it is not filed for record. If it was not properly recorded after the grantee had left it to be filed for record, and by reason thereof a subsequent purchaser is misled, he surely has

<sup>1</sup> Merrick v. Wallace, 19 Ill. 486.

no right to say that the first purchaser shall suffer by this omission of the recorder to perform his duty, rather than himself. The statute leaves such a loss to fall where the common law left it. In such a case the subsequent purchaser cannot call in aid the statute, because his case does not come within its provisions. In such a case the statute is silent, and the common law must take its course. He must seek his remedy against the recorder.”<sup>1</sup>

§ 682. **Reasonable precaution.**—Where, under the registration laws, the filing of a deed is equivalent to its actual registration, the fact that a subsequent *bona fide* purchaser for value and without notice took every reasonable precaution to ascertain the condition of the title, and bought and paid for the land only on the assurance of the recording officer that there was in his office no evidence of a conflicting right to the property, cannot give his deed precedence over such prior deed filed for record, but not actually recorded.<sup>2</sup> In Virginia, it is held that although

<sup>1</sup> *Merrick v. Wallace*, 19 Ill. 486, 497.

<sup>2</sup> *Throckmorton v. Price*, 28 Tex. 606; 91 Am. Dec. 334. Said the court: “In whatever manner the question presented in this case is decided, it must operate to the injury of innocent parties; there is, therefore, no equitable consideration favoring a preference of the parties on one side over those on the other. The point in issue between them must be determined by an application of the provisions of the registration laws to the facts of the case. When this is done, there cannot be the slightest doubt as to a correct decision of the question before us, and that the instruction given to the jury was erroneous. But for the registration law, the older title would obviously convey the better right. And it is the uniform provisions of these laws that such instruments as must be recorded shall be valid as to all subsequent purchasers for a valuable consideration without notice, and as to creditors from the date when such instrument shall be properly acknowledged, proved, or certified and delivered to the clerk for record, and from that time only. (O. & W., arts. 1726, 1727, 1730, 1731.) And lest there should be any doubt in the matter, it is further enacted that any instrument required to be recorded shall be considered as recorded from the time it was deposited for record with the clerk. (O. & W., art. 1709.) And to enable all persons who may wish to examine the office to ascertain what instruments have been deposited for record, it is also made the duty of the clerk (O. & W., art. 1707), when any instrument has been deposited for record, to enter in alphabetical order, in a book to be provided for that purpose, the names of the parties to such instrument, the date and nature thereof, and the

the deed may be lost by the negligence of the recorder, or may be stolen from his office, it must be considered as recorded, if it has been left with him for record.<sup>1</sup> Where

time of its delivery for record. And as a further facility and security for persons wishing to make an examination in the office of the recorder for instruments required by law to be recorded, the clerk, after recording any such instrument, is directed to enter the same in the index-books which he is required to keep of recorded instruments. (O. & W., arts. 1710, 1711, 1712.) If the clerk has neglected to comply with these plain and simple requirements of the statute, and appellees have been thereby misled to their injury, they cannot claim redress for such injury from appellants, who have been in no default. The law did not impose upon them the responsibility of seeing that the duties prescribed by the statute for the protection and security of other parties, were, in fact, faithfully discharged by the clerk. Registration laws of a general similarity to ours have been enacted in most of the other States, yet we have been able to find no case in which the first deed has been postponed in favor of the second, from the failure of the clerk to record the prior deed as directed by the statute, while the contrary has been frequently decided." And see *Woodson v. Allen*, 54 Tex. 551.

"In *Oats v. Walls*, 28 Ark. 244, 247, the court said: "Our own court, through Justice Bennett, in the case of *Harrison & Stewart v. Lewis*, Commissioner, 26 Ark. 154, said: 'The certificate of entry now before us was issued in strict conformity to the above enactment, with the exception of making a note of such entry on his township maps, and in his books, to be kept for that purpose. It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him': *Lytle v. The State*, 9 How. 833. In the *United States v. Castillero*, 2 Black, 97, the Supreme Court of the United States say: 'Besides, it is a universal rule that omissions by a public officer, in the mode of complying with forms prescribed to him as his duty, are not permitted to affect the party': *Nichols v. Reynolds*, 1 R. I. 36; 36 Am. Dec. 238. In 5 Marsh. J. J. 558, it is said the mistake of the officer ought not to prejudice the rights of the parties. To the same effect, see *Merrick v. Wallace*, 19 Ill. 486; 3 Peters, 338. That the grantee was only bound to properly file his deed for record, and thereafter it was the duty of the clerk (for the performance of which the clerk alone is responsible) to note the filing and enter it upon the record, is, in effect, held by the above and other cases."

The record is not vitiated by the fact that it contains no copy of the seal, or any mark to indicate a seal. It is sufficient if the deed which is recorded purports to be under seal: *Smith v. Dall*, 13 Cal. 510. And see *Jones v. Martin*, 16 Cal. 165.

<sup>1</sup> *Beverly v. Ellis*, 1 Rand. 102. The court said that the construction of the words of a section which gave a deed priority if filed for record, "and recorded according to the directions of this act," would not be

this rule prevails, it is possible that a party, in the registration of whose deed a mistake was made, might be estopped, if, after knowledge of the defect in the record, he is guilty of laches in failing to give notice of his title.<sup>1</sup>

**§ 683. Contrary view that purchaser is bound by only what appears upon the record, and grantee must suffer for mistake in record.**—On the other hand, the doctrine announced by many courts is, that the records are only notice of what they contain, and that if a deed has been filed for record, but incorrectly copied, the grantee filing the deed must suffer for any error contained in the record, rather than an innocent purchaser who has parted with value in the belief that the records truly disclosed all the rights of others.<sup>2</sup> The courts that declare this rule, while admitting for the most part that the record of a deed becomes effective from the time that a deed

tolerated, "which would make it depend on the acts or omissions of the clerk, over whom he has no control, and with whom the law compels him to deposit his deed. A different construction would be attended with great mischief. The act having prescribed no time to the clerk to record a deed by spreading it on the record, its validity would be fluctuating and uncertain, and the object of the act defeated. If there is any defect in the notice when searched for, the subsequent purchaser, perhaps, has his remedy against the clerk, if it was his duty to make it perfect."

<sup>1</sup> See *Lee v. Birmingham*, 30 Kan. 312.

<sup>2</sup> *Potter v. Dooley*, 55 Vt. 512; *Jennings v. Wood*, 20 Ohio, 261; *State v. Davis*, 96 Ind. 539; *Barnard v. Campau*, 29 Mich. 162; *White v. McGarry*, 2 Flipp. C. C. 572; *Terrell v. Andrew County*, 44 Mo. 309; *Brydon v. Campbell*, 40 Md. 331; *Payne v. Pavey*, 29 La. Ann. 116; *Miller v. Bradford*, 12 Iowa, 14; *Sanger v. Craigue*, 10 Vt. 555; *New York Life Ins. Co. v. White*, 17 N. Y. 469; *Heistner v. Fortner*, 2 Binn. 40; 4 Am. Dec. 417; *Gilchrist v. Gough*, 63 Ind. 576; 30 Am. Rep. 250; S. O. 19 Alb. L. J. 276; *Disque v. Wright*, 49 Iowa, 538; s. c. 13 West. Jur. 34, 158; *Taylor v. Hotchkiss*, 2 La. Ann. 917. See, also, *Beekman v. Frost*, 18 Johns. 544; 9 Am. Dec. 246; *Frost v. Beekman*, 1 Johns. Ch. 299; *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260; *Taylor v. Harrison*, 47 Tex. 454; 26 Am. Rep. 304; *Sinclair v. Slawson*, 44 Mich. 123; 38 Am. Rep. 235; *Donald v. Beales*, 57 Cal. 399; *Page v. Rogers*, 31 Cal. 293; *Smith v. Lowry*, 113 Ind. 37; 15 N. E. Rep. 17; *McLarren v. Thompson*, 40 Me. 284; *Hill v. McNichol*, 76 Me. 314; *Stedman v. Perkins*, 42 Me. 130; *Ritchie v. Griffiths*, 1 Wash. St. 429; 22 Am. St. Rep. 155; 25 Pac. Rep. 341. Where a deed appears to have been recorded twice, and there

is filed with the recording officer for registration, draw a distinction in cases where after filing the deed its contents are not correctly spread upon record. They hold that the purchaser is not bound to enter into a long and laborious search into the original papers to ascertain whether the recorder has faithfully performed his duty or not. They consider that the obligation of giving notice is placed upon the person who holds the title, and that he, and not an innocent purchaser, must suffer the consequences of an imperfect performance of this duty.

§ 684. Fuller presentation of this view.—For a fuller presentation of the view taken by the courts adopting this rule, we may refer to a case in Missouri, where Mr. Justice Wagner, in delivering the opinion of the court, said: "It is contended here on behalf of the county, that according to our statute, when a person files with the recorder an instrument, it imparts notice of its real contents to all subsequent purchasers, regardless of any mistakes that the recorder may commit in placing it on record; that the statute provides that every instrument in writing certified and recorded in the manner prescribed shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice. According to the literal interpretation of the section, no notice is imparted till the instrument is actually placed on record, and then it relates back to the time of filing. It was, no doubt, the intention of the legislature to give a person filing an instrument or conveyance all the benefit of his diligence; and when he deposits the same with the recorder, and has it placed on file, he has done all that he can do, and has complied

is a dissimilarity between them as they are recorded, the court will take into consideration the evidence afforded by the records themselves as to which has been more carefully registered, the situation of the property as described in each, and the conduct of the parties as it relates to the property in dispute: *Stinson v. Doolittle*, 50 Fed. Rep. 12.



with the requirement of the law. From that time it will give full notice to all subsequent purchasers and encumbrancers. A person in the examination of titles, first searches the records; and if he finds nothing there, he looks to see if any instruments are filed and not recorded. If nothing is found and he has no actual notice, so far as he is concerned, the land is unencumbered. If he finds a conveyance he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory. Grantees do not usually leave their deeds lying in the recorder's office for the inspection of the public. After they are recorded, they take them out and keep them in their possession. In a large majority of cases, it would not only entail expense and trouble, but it would be useless to attempt to get access to the original papers. Hard and uncertain would be the fate of subsequent purchasers if they could not rely upon the records, but must be under the necessity, before they act, of tracing up the original deed to see that it is correctly recorded. The statute says that when the deed is certified and recorded it shall impart notice of the contents from the time of filing. Certainly; but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. It never was intended to impose upon the purchaser the burden of entering into a long and laborious search to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests on the party holding the title. If he fails in his duty, he must suffer the consequences. If his duty is but imperfectly performed, he cannot claim all the advantages and lay the fault at the door of an innocent purchaser."<sup>1</sup>

<sup>1</sup> *Terrell v. Andrew County*, 44 Mo. 309, 311. In *Sawyer v. Adams*, 8 Vt. 172, 176, 30 Am. Dec. 459, the court, per Williams, C. J., say: "In such cases, the purchaser may be wholly free from fault or negligence. He may deliver his deed to the proper officer, and it may be returned to him as recorded, but through accident or design it is not truly recorded.

In Iowa, the language of the statute of 1839, was that an instrument in writing, properly certified and acknowledged, "shall from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice."<sup>1</sup> The supreme court of that State placed an entirely different construction upon this statute from that given in Illinois to one of similar import.<sup>2</sup> Wright, J., delivered the opinion of the court, and, referring to this statute, said: "This statute in our opinion was only intended to fix the *time* from which notice to subsequent purchasers was to commence, and not to make such filing or depositing notice of the contents *after* the same was recorded. After the record of the deed, the record itself is the constructive notice of its contents, and it never was the intention of the legislature to hold

Subsequent purchasers or creditors having no other means of knowledge of the contents of the deed than by resorting to the records, cannot be considered as having notice of any other conveyance than such as appeared on record. The object of recording, as has already been noticed, is for the purpose of notice to after-purchasers and creditors. In considering what is necessary to complete a record, it will not answer to say that the record may be so made as entirely to defeat the object for which it was designed. The purchaser may fairly deliver his deed to the town clerk. The clerk may return it to him with a regular certificate that it has been recorded; and if he does nothing more, if he does not record it in fact, there is no actual or constructive notice to purchasers of the existence of such deed. The clerk is guilty of fraud, and the person who left the deed for record is deceived; still his deed is not recorded and no title passes thereby, except as against the grantor and his heirs. In such a case there can be no doubt that the purchaser will lose his title through the fault or fraud of the town clerk." See, also, *Huntington v. Cobleigh*, 5 Vt. 49; *Skinner v. McanDiel*, 5 Vt. 539. In *Jenning's Lessee v. Wood*, 20 Ohio, 261, 266, it is said by Caldwell, J., delivering the opinion of the court: "The obligation rests on the party holding the title to give the notice. He controls the deed; he can put it on record or not at his pleasure. If from any cause he falls short of giving the legal notice, the consequences must fall on himself. It is his own business, and he must suffer the consequences of its being imperfectly performed." See *Curtis v. Root*, 28 Ill. 367.

<sup>1</sup> *Miller v. Bradford*, 12 Iowa, 14.

<sup>2</sup> For case in Illinois, see *Merrick v. Wallace*, 19 Ill. 486, § 681.

a subsequent purchaser, buying after the recording, bound by the contents of a deed, ever so improperly and incorrectly recorded, because at some time a deed correct in the description of the property was filed with the recorder.”<sup>1</sup>

§ 685. **Views of Mr. Pomeroy.**—Mr. Pomeroy, in his treatise on Equity Jurisprudence, takes the view that a record is constructive notice only to the extent that it is a true copy of the original instrument, and that a subsequent purchaser may act upon the information disclosed by the records, irrespective of the question whether they set out the original deed correctly or not. He says: “A record is a constructive notice, only when, and so far as, it is a true copy, substantially, even if not absolutely, correct, of the instrument which purports to be registered, and of all its provisions. Any material omission or alter-

<sup>1</sup> *Miller v. Bradford*, 12 Iowa, 19. See, also, *Miller v. Ware*, 31 Iowa, 524; *Disque v. Wright*, 49 Iowa, 538. In *Frost v. Beekman*, 1 Johns. Ch. 288, the Chancellor said: “The true construction of the act appears to be that the registry is notice of the contents of it and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act in providing that all persons might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that was not the intention, as it certainly is not the sound policy of the statute; nor is it repugnant to the doctrine contained in the books, that notice to a purchaser of the existence of a lease is notice of its contents.” See, also, *Peck v. Mallams*, 10 N. Y. 518; *Ford v. James*, 4 Keyes, 300. But it was held in *Simonson v. Falihee*, 25 Hun, 570, that a release of mortgaged land is complete when it is left with the clerk for record, and that where there is no fraud or collusion, the party is not responsible for an error of the clerk in recording it, and the erroneous record in such a case does not bind the party executing the release.

ation will certainly prevent the record from being a constructive notice *of the original instrument*, although it may appear on the registry books to be *an* instrument perfect and operative in all its parts. The test is a plain and simple one. It is, whether the record, if examined and read by the party dealing with the premises, would be an *actual* notice to him of the original instrument, and of all its parts and provisions. By the policy of the recording acts such a party is called upon to search the records, and he has a right to rely upon what he finds there entered as a true and complete transcript of any and every instrument affecting the title to the lands with respect to which he is dealing. A record can only be a constructive notice, at most, of whatever is contained within itself."<sup>1</sup> And again: "Furthermore, the record of an instrument which is itself duly executed and entitled to be registered, does not operate as a constructive notice, unless it is made in the proper form and manner, in the proper book, as required by the statute. The policy of the recording acts is that those persons who are affected with constructive notice should be able to obtain an actual notice and even full knowledge by means of a search. A search could not, *ordinarily*, be successful and lead the party to the knowledge which he seeks, if the instrument were recorded in a wrong book. This rule, therefore, instead of being arbitrary and technical, is absolutely essential to any effective working of the statutory system."<sup>2</sup>

§ 686. **Comments.**—The author is compelled to dissent from the views expressed by Mr. Pomeroy, and from the doctrine which prevails in several of the States, that a grantee is held responsible for defects in the record not caused by his act or through his procuration, but by an officer over whom he can exercise no control. The grantee, by depositing his deed with the recording officer, does all that he can do. He complies with every requirement of the statute. It is universally conceded,

<sup>1</sup> 2 Pomeroy's Eq. Jur., § 654.

<sup>2</sup> 2 Pomeroy's Eq. Jur., § 653.

when his deed is correctly copied into the records, that notice is given from at least the time the conveyance is deposited with the proper officer. We can see no reason for the restriction that notice shall be thus given only on condition that the deed is subsequently correctly copied. If the grantee, by depositing the deed with the recorder, has given the notice required of him by the statute, and has, by this step, obtained all the priority and acquired all the rights of a purchaser whose deed is first recorded, why should his title afterward become, by the carelessness, or, perhaps, fraudulent design of the recording officer, subordinate to that of another, who, on equitable grounds, aside from the arbitrary provisions of the statute, can be entitled to no more favorable consideration than he? It cannot be said that the permanent and continued existence of the record is essential to preserve the priority that a purchaser obtains by the due record of his instrument. For as we point out, in a following section, the subsequent destruction of the book in which the deed is recorded, by fire, the mad caprice of a mob, the mishaps of war, or the hand of some person who desires its destruction for selfish and fraudulent purposes, cannot deprive the record of the effect of giving constructive notice, acquired by the original registration. When the record is destroyed, as a matter of fact, it must cease to give notice. Still it is considered, on the soundest logic and reason, that when a person has filed his deed for record, he has complied with the law, and cannot be affected by the destruction afterward of the record. Why, then, should he be held responsible when the record is not totally destroyed, but rendered imperfect by the act of a public officer, whose acts he cannot supervise? Again, the recording acts are intended for the benefit of subsequent purchasers and encumbrancers. The first grantee requires no protection. By the principles of the common law, in the absence of statutory regulation, he succeeds by his deed to all the title of his grantor, and unless the law places upon him

the obligation of doing some particular act, his deed on common-law principles is good against everybody. The second purchaser can succeed, so far as the question of title alone is concerned, only to the interest of his grantor, and if that has been antecedently conveyed, he, by a second conveyance, can acquire nothing. But for the protection of the *subsequent* purchaser, the law requires the first grantee to give notice of his deed by procuring its registration, or to suffer the consequence of its postponement to the conveyance of another, who deals with the same grantor in good faith and without notice of such prior deed. Now, it is obvious that the registration laws are intended for the *benefit* of the *subsequent* purchaser, and it seems to us a reasonable rule, that if the first grantee does all that he has the power to do to secure to subsequent purchasers the benefit of this notice by the record, he should not be held responsible because a public officer failed to do his duty. It is true, that it may be hard to declare that a purchaser who has parted with his money, on the assurance given by the records that the grantor possessed title, acquires nothing because the records are incorrect, and do not show a prior conveyance. It may indeed, be said that to declare such a rule will cause purchasers to lose faith in the records, and will retard the sale of property. But it must be remembered that it is equally hard to say that the first purchaser must lose the property that he has purchased when he has complied strictly with every provision of the statute, and has not been guilty of the slightest negligence. One of two innocent persons must, of necessity, be damaged, and, in our judgment, the loss should fall upon the second purchaser rather than upon the first. And this loss is not so severe as at first glance it may seem. He can recover back the purchase money for a failure of consideration, and he has his remedy against the recording officer for his dereliction of duty, and in several of the States severe penalties are prescribed for the execution of a second deed of the same property by the same grantor with intent to defraud a

prior purchaser. On the whole, while on this question the authorities are divided, and either view is supported by a number of well-considered cases, yet we think the most reasonable rule is the one we have stated. While this is our opinion, still it must be confessed that neither view can be said to be supported by the preponderance of authority.

**§ 687. Effect of mistake in copying deed when considered recorded as soon as filed.**—In those States in which the rule prevails that a deed is considered in law recorded the moment it is deposited with a proper officer for registration, it follows, as a natural conclusion, that any error in transcribing the deed cannot injure the grantee. A married woman conveyed land by deed, and the deed was acknowledged and recorded. Twelve years after it was recorded it was supposed to have a defective acknowledgment, and a copy of the deed was obtained from the recorder's office, which the grantor acknowledged to be her act and deed for the purposes therein mentioned, she then being a widow. The copy of the deed was returned properly acknowledged and given to the recorder to be recorded. The recorder did not transcribe this copy and the certificate of acknowledgment in their entirety, but, acting under the impression that the original deed was already recorded, he deemed it unnecessary to re-record that, but simply added upon the record the certificates annexed to the deed, with a reference to the original deed. The court held that if a widow by reacknowledging a void deed executed by her while married gives it validity, that it is sufficient if she acknowledge it to be her deed, without re-signing it; and when the deed is left for record, the grantee's rights are protected though the officer records only a portion of it.<sup>1</sup>

<sup>1</sup> *Riggs v. Boylan*, 4 Biss. 445. Said the court: "The duty of the recorder was to re-record the deed that was handed to him in 1839, with the added certificates, and I think that the deed having been given to him to be recorded, and his duty being to record it, and he having recorded nothing but the certificates, with a reference to the original, that



A mistake in transcribing a mortgage, by which it is made to appear as security for a smaller amount than that named in it, does not, as against subsequent purchasers and encumbrancers, impair its efficiency.<sup>1</sup>

§ 688. **Effect of mistake where opposite view prevails.** Where it is held to be the duty of a grantee to see that his deed is properly spread upon the records, subsequent purchasers are charged with such notice only as they actually have or obtain from an inspection of the records. If, for instance, the recorder, by mistake, writes in the record the name of another person as the grantor in the deed in the place of the true grantor, the deed in Ohio is not considered duly recorded, and will not charge a subsequent purchaser with notice.<sup>2</sup> In the case cited, the recorder's mistake in recording the deed, consisted in recording the name of the grantor as *Samuel* Granger, when the name in the deed, and the true name, was *Lemuel* Granger.<sup>3</sup> Where a mortgage is given as security

the rights of the purchaser must be considered as having the shield of the law thrown upon them, and the deed did transfer the title."

<sup>1</sup> *Mims v. Mims*, 35 Ala. 23; *Dubose v. Young*, 10 Ala. 365. See *Musser v. Hyde*, 2 Watts & S. 314; *Wood's Appeal*, 82 Pa. St. 116; s. c. 16 Am. Law Reg. 255; *Brooke's Appeal*, 64 Pa. St. 127, and cases cited.

<sup>2</sup> *Jennings v. Wood*, 20 Ohio, 261.

<sup>3</sup> *Jennings v. Wood*, *supra*. The court on this point said: "Did Jennings have notice of his title placed on record? He did not. The deed put on record purported to be a deed from a different person. It is only by the names of the parties conveying that a claim of title can be traced. Take the title in controversy as an illustration. If a person had gone to the record to ascertain the situation of this title; if, commencing at the source of titles, he had traced it down from grantee to grantee, until he should have found that the title had passed to Lemuel Granger, then all that he would have to do to ascertain whether the record showed any conveyance from Lemuel Granger, would be to examine the index to ascertain whether any conveyance had been made by Lemuel Granger; if none such appeared, then the record would give notice of no such conveyance. It would give him notice, however, that the title was still in Lemuel Granger. The reason that a party is chargeable with constructive notice is, that by an examination of the record, he will have actual notice. The deed actually shown on record was by a person who had nothing to do with the title, and was, to all intents and purposes, a different conveyance from the one by which Jennings claims. But it is

for the payment of three thousand dollars, but upon the record it appears by mistake to have been given for three hundred dollars, it is notice to subsequent purchasers only for the sum expressed in the registry.<sup>1</sup> Where a deed was executed for *four-tenths* of an interest in land, but by mistake in the registration it appeared on the records to be for a *fourteenth* interest only, it was held that constructive notice was given of the conveyance of the land to the extent of one-fourteenth part only.<sup>2</sup> It has also been decided that if a town clerk copies a deed delivered to him for registration in a book in which no deeds had been recorded for upward of twelve years, and for the purpose of concealment and fraud, does not insert the names of the parties to the deed in the index, such a deed is not recorded, and it is held that no notice is given thereby to subsequent purchasers and attaching creditors.<sup>3</sup>

§ 689. Continued.—And if a deed for the east half of a lot is recorded as a deed of the west half, a subsequent purchaser of the east half, who has no notice that an error has been committed in the registration of the deed, will under this view be fully protected.<sup>4</sup> So where a deed conveys one-half of the grantor's *individual* right, title, and interest, into and to a certain piece of land, but, by mistake of the recorder, it is registered as a conveyance of one-half of the grantor's *undivided* right, subsequent *bona fide* purchasers are charged with notice of the conveyance of only the estate shown by the records.<sup>5</sup> Under

said that Jennings had a good deed, and that he had done all that it was necessary for him to do; that the mistake was that of the recorder, and that he should not suffer for the default of the officer. It may be a hardship on Jennings, it no doubt is; but here one of two innocent persons must suffer; and whenever this is the case, the rule is, that the misfortune must lie where it has fallen, it must rest on the person in whose business and under whose control it happened."

<sup>1</sup> Frost v. Beekman, 1 Johns. Ch. 288.

<sup>2</sup> Brydon v. Campbell, 40 Md. 331.

<sup>3</sup> Sawyer v. Adams, 8 Vt. 172; 30 Am. Dec. 459.

<sup>4</sup> Sanger v. Crague, 10 Vt. 555.

<sup>5</sup> Miller v. Bradford, 12 Iowa, 14.

the Wisconsin statute, a deed must be attested by two witnesses to entitle it to be recorded. It is held in that State that if an error is made in recording a conveyance at length, by omitting to copy the attestation, subsequent purchasers and mortgagees are not charged with constructive notice.<sup>1</sup> Under this view, where a mortgage covering the northwest quarter of a tract of land was made to appear in the record as a mortgage of the northeast quarter, it was held that a grantee in a subsequent deed of the northwest quarter was not affected by the mortgage.<sup>2</sup>

**§ 690. Destruction of record.**—After a deed has been once properly recorded, the destruction of the book in which it is recorded does not affect the constructive notice afforded by the original record.<sup>3</sup> When a party has

<sup>1</sup> *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772. It appeared in this case, however, in a suit upon a mortgage defectively recorded in this respect, that one of the defendants at the time he purchased a part of the mortgaged premises "had heard that there was a defective railroad mortgage upon them, but did not look for it, because his abstract did not show it." The court held that under such circumstances, he must be deemed to have had actual notice of the mortgage.

<sup>2</sup> *White v. McGarry*, 2 Flipp. C. O. 572.

<sup>3</sup> *Steele v. Boone*, 75 Ill. 457; *Armentrout v. Gibbons*, 30 Gratt. 632; *Gammon v. Hodges*, 73 Ill. 140; *Heaton v. Prather*, 84 Ill. 330; *Curyea v. Berry*, 84 Ill. 600; *Myers v. Buchanan*, 46 Miss. 397. And see *Deming v. Miles*, 35 Neb. 739; 37 Am. St. Rep. 464; *Alvis v. Morrison*, 63 Ill. 181; 14 Am. Rep. 117; *Shannon v. Hall*, 72 Ill. 354; 22 Am. Rep. 146; *Taylor v. Franklin Sav. Bank*, 50 Fed. Rep. 289; *Paxson v. Brown*, 61 Fed. Rep. 874; *Hyatt v. Cochran*, 69 Ind. 436; *Addis v. Graham*, 88 Mo. 197; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376; *Thomas v. Hanson*, 59 Minn. 274; 61 N. W. Rep. 135. The fact that the deed has been recorded may be shown by the certificate of the recorder, or by the index-book or other secondary evidence: *Smith v. Lindsay*, 89 Mo. 76; 1 S. W. Rep. 88; *Alvis v. Morrison*, 63 Ill. 181; 14 Am. Rep. 117; *Cowles v. Hardin*, 91 N. C. 231; *Paxson v. Brown*, 61 Fed. Rep. 874; *Stebbins v. Duncan*, 108 U. S. 32. But see *Weber v. Moss*, 3 Tex. Civ. App. 13, 21 S. W. Rep. 609, where it is held that if the record of a deed is partially destroyed so as not to show that the deed was properly acknowledged for registration, such record does not charge subsequent purchasers with constructive notice of the deed. In *Myers v. Buchanan*, 46 Miss. 397, the court said: "We have, however, no hesitation in affirming the general proposition propounded by the complainant, and hold

placed his deed upon record, he has complied with all the requirements of the law. After the record has been destroyed by fire, he is not compelled to record his deed a second time, or to do any other act to notify subsequent purchasers, in order to be protected in his rights under his deed.<sup>1</sup> "It is true," said Mr. Justice Craig, "a party who owns real estate in Cook county may, if he thinks proper, in case the record of his title has been destroyed, again record his title papers; yet he is under no legal obligation to incur that expense. It is no doubt true that a large number of deeds and other instruments of writing, relating to land in Cook county, which were recorded previous to the fire, have been lost or destroyed, and could not be produced. To hold, therefore, that the owner of property was required to again record the title papers, or be liable at any moment to lose the title, would be establishing a precedent of the most dangerous character. The result of the doctrine contended for by appellant would compel, in numerous instances, parties who owned real estate in Cook county to take immediate possession, or otherwise their titles would be at the mercy of subsequent purchasers."<sup>2</sup>

the deed of trust in favor of Myers, in 1861, constructive notice to all the world, notwithstanding the disordered condition of the records in 1865. It would be monstrous to declare a lien, acquired by a duly recorded mortgage, lost by subsequent partial or total destruction of the records. Such a rule would subject every lien in the State to the hazards of accidental fire, the caprice of incendiaries, and the casualties of war."

<sup>1</sup> Gammon v. Hodges, 73 Ill. 140. See Hyatt v. Cochran, 69 Ind. 436. Under the statute of Texas, where county records are destroyed, deeds which are preserved must be recorded within four years, and unless so re-recorded, the first record does not constitute notice as against a *bona fide* purchaser: Magee v. Merriman, 85 Tex. 105; 19 S. W. 1002; O'Neal v. Pettus, 79 Tex. 255; Weber v. Mass, 3 Tex. App. 13; 21 S. W. Rep. 609; Barcus v. Bringham, 84 Tex. 538; 19 S. W. Rep. 703; Salmon v. Huff, 80 Tex. 133; 15 S. W. Rep. 257.

<sup>2</sup> See Gammon v. Hodges, *supra*. See, also, Shannon v. Hall, 72 Ill. 354; 22 Am. Rep. 146; Alvis v. Morrison, 63 Ill. 181; 14 Am. Rep. 117. In Texas it was held that where one had recorded his deed, and the records were destroyed, his failure to take steps to have his conveyance again recorded, is not negligence, as against a subsequent purchaser from the original vendor, who, not having paid the price in full, could

§ 691. **Proof of deed where record destroyed.**—Where the record has been destroyed, and it becomes material to prove the execution of the deed, it may be proved in most instances, by the production of the deed itself, and hence little difficulty will generally be experienced. But when the record has been destroyed and the deed lost, its execution must be proven like that of any other lost paper, by secondary evidence. What evidence will suffice to prove this fact is a matter to be determined by the court or jury, and of course it is impossible to lay down a universal rule as to the amount of evidence that will be required to establish this fact. It has been decided, however, where a deed and its record had both been destroyed by fire, that its execution is sufficiently proven by the testimony of a clerk of an abstract firm, that the deed had been filed for record, and that the day after its execution he had made a minute of it, which he produced, and the testimony of a partner of the person claiming to be grantee that the deed was, in his opinion, executed in his office and was taken away for the purpose of acknowledgment. Such testimony will prevail against the positive denials of the grantors that they at any time had executed such a deed.<sup>1</sup>

§ 692. **Index as part of the record—Comments.**—The index is a very important aid to searchers in enabling them to ascertain whether a particular individual has conveyed his title. Without the assistance furnished by the index, it would be practically impossible for an ordinary person, with no peculiar means of information, to learn from the inspection of the records the condition of a title. The index is generally required by the registry laws to be kept as one of the official records. In connection with the question we have just discussed, the inquiry arises, is an index placed on the same footing as the record-book itself, and what consequence, if any, results from a mistake in the index by which an innocent purchaser may

not claim the equity of a *bona fide* purchaser: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71.

<sup>1</sup> *Heacock v. Lubuke*, 107 Ill. 396.

be misled? On this question, we shall encounter, to some extent, the same conflict in the decisions, that we found existed on the question as to the person who should suffer for an error in the transcription of the original deed into the records.

**§ 693. View that deed improperly indexed does not give constructive notice.**—In Pennsylvania, in one case, the court held that a conveyance not correctly indexed was not constructive notice.<sup>1</sup> But as the case was decided on the ground that the subsequent purchaser had actual notice of the prior conveyance, it was unnecessary to pass upon this question. Mr. Chief Justice Woodward, however, remarked: "But it was not duly indexed, and not therefore, constructive notice to third parties. As a guide to inquirers, the index is an indispensable part of the recording, and without it, the record affects no party with notice."<sup>2</sup> In a later case in the same State this question incidentally arose, but the court did not decide it. The deed had been properly indexed in the separate index, but not in a general index which the officer kept for convenience of searchers. The law did not require the recorder to keep a general index. The court held that as the deed was indexed in the particular index required by law to be kept, it was sufficient to give notice but observed: "Whether his title can be taken from him by the omission to enter his recorded and certified deed in the particular index, may admit of question, but we give no opinion on this point."<sup>3</sup> The view that a deed

<sup>1</sup> *Speer v. Evans*, 47 Pa. St. 141.

<sup>2</sup> *Speer v. Evans*, 47 Pa. St. 141.

<sup>3</sup> *Schell v. Stein*, 76 Pa. St. 398; 18 Am. Rep. 416. Mr. Chief Justice Agnew delivered the opinion of the court, and said: "The question presented by the record in this case is, whether a deed regularly acknowledged or proved, and recorded in the proper book, and indexed in the separate index appropriated to the book, but not in the general index of all the deed-books, is not defectively recorded. If it be, the conceded principle is that a deed defectively registered is a nullity as to subsequent purchasers or mortgagees. There is no law which requires the recorder to keep a general index to all the deed

incorrectly indexed does not give notice is to some extent sanctioned in some other States.<sup>1</sup>

**§ 694. Decisions in Iowa on this question.**—In Iowa several decisions have been rendered on this question,

or mortgage-books in his office. That it is a great convenience, and, in the populous counties of the State, has become a necessity, is evident, but it is the province of the legislature, and not of this court, to make this convenience or the necessity the subject of law. The registration of deeds is purely a system of legal institution, and not of common right or abstract justice. At common law, in England, there was no system of registration, and the rule between claimants of the same title was found in the maxim, *prior in tempore potior est in jure*. In this State the system has been one of growth. The original act of 1715 did not even require the record to be a book. The recorder was to provide parchment or good large books, and his certificate was to give the number of the book or roll. No provision was made for indexing until the act of 1827, which was applicable to other offices as well as that of the recorder. But so early as 1775 the law required a bond of the recorder with sufficient sureties, which was to be held for the use of 'parties that shall be indemnified or aggrieved' in the same manner as sheriff's bonds. The duty of searches is that of the officer, not of parties, and he must see to it that no mistakes are made in searching. The act of 1827 imposed no duty as to indexes, except to have one for each and every book. If greater convenience induces the recorder to keep a general index, to save the handling of different books, and he omits to index a deed in it, and thereby overlooks a deed regularly recorded and duly indexed in the proper book, his certificate makes him liable to the party who is injured by it. But surely the one who has had his deed duly acknowledged or proved, recorded in the proper book, and certified under the hand and seal of the office of the recorder in due form, has done all the law requires of him. On what principle of law or sound reason shall he be required to supervise the officer's gratuitous indexing of deeds in an index not required by law? He is not to be presumed to be familiar, and, as a fact, nine out of ten persons are not familiar, with the system of the office. All the citizen can be bound to know is the law, and he is warned by no law that there must be kept a general index."

<sup>1</sup> See *Barney v. McCarty*, 15 Iowa, 510; 83 Am. Dec. 427; *Whalley v. Small*, 25 Iowa, 188. See, also, *Handley v. Howe*, 22 Me. 560; *McLaren v. Thompson*, 40 Me. 284. Where the statute requires the recording officer to keep indexes in which the names of grantors must be placed alphabetically, a tax deed, until it is indexed, is held not to be recorded nor admissible in evidence: *Hiles v. Atlee*, 80 Wis. 219; 27 Am. St. Rep. 32; *Howe v. Thayer*, 49 Iowa, 154. In Wisconsin, the omission to enter a description of the land under the appropriate head in the general index is cured by transcribing at length the deed containing such description in the proper record: *St. Croix etc. Co. v. Ritchie*, 73 Wis. 409. See, also, *Oconto Co. v. Gerrard*, 46 Wis. 317.



based upon the statutes in force in that State. In one case<sup>1</sup> the court said that an analysis of the statute showed that the recorder was required to perform the following acts with respect to all instruments required to be recorded: "1. File all deeds, etc., presented to him for record, and note on the back of the same the hour and day they were presented for record." "2. Keep a fair book on which he shall *immediately* make an entry of every deed, giving date, parties, description of land, dating it on the day when it was filed in his office." "3. Record all instruments in regular succession." "4. Make and keep a complete alphabetical index to each record-book, showing page on which *each* instrument is recorded, with the names of the parties thereto." The opinion of the court was delivered by Mr. Justice Dillon, who said that reading this statute with the others on the same subject, the court was of the opinion that in order to constitute a compliance with their requirements, it was necessary that each of the following steps should be substantially observed: "1. The instrument must be deposited or filed with the recorder for record. He thereupon notes the fact, and 'the hour and day,' on the back thereof, and the day on 'the fair-book,' as it is styled, and retains the instrument in his office. The instrument itself thus remaining on file in his office with the indorsement upon it, and the entries in the 'fair-book,' which are required to be immediately made, constitute the notice until the instrument is actually extended upon the records. 2. The next step in the process is the recording, that is, the copying of the instrument at large into the 'record-book,' and noting in it the precise time when it was filed for record. The object of this noting is that the record may show on its face when the notice commences. 3. The third and final step is the indexing of the instrument so recorded. The statute prescribes the requisites of the index. It shall be a complete alphabetical index to each record-book, and shall give the names of the parties, and show the page

<sup>1</sup> Barney v. McCarty, 15 Iowa, 510; 83 Am. Dec. 427.

where each instrument is recorded. The paging cannot, of course, be given until the deed is actually transcribed into the record-book, and up to this time it remains on file. When recorded and indexed the deed may be withdrawn, and the record takes its place, and constructively imparts notice to the world of its existence and contents." The justice then remarked: "Keeping in view alike the well-known objects and the enlightened policy on which the registry acts are based, as well as the language and requirements of the several statutes above cited, the court are of the opinion that all three of these steps are essential, integral parts of a complete, valid registration." He then examined several cases cited by the counsel for the respective parties, and concluded the opinion by observing: "To hold that an index is not essentially part of a valid and complete registration in this State, would overlook the uniform practice of relying wholly upon it to find the names of the various owners in tracing titles, and would also ignore the fundamental design of the recording acts, which is to give certainty and security to titles, by requiring all deeds and liens to be made matters of public record, and thus discoverable by all persons who are interested in ascertaining their existence, and who will examine the records in the mode which the law has pointed out." It was accordingly held that the omission to index a conveyance deprived the record of imparting constructive notice of its contents.<sup>1</sup> But where a conveyance was filed in the proper office, and entered of record on page "546" of the proper book, but the index entry, while showing the names of the grantor and grantee, and substantially the "nature of the instrument," and the book in which the record was made, stated the page of the record as "596," it was held that the index was operative as constructive notice of the acts which would be disclosed by an examination of the record.<sup>2</sup> In another case

<sup>1</sup> *Barney v. McCarty*, 15 Iowa, 510; 83 Am. Dec. 427.

<sup>2</sup> *Barney v. Little*, 15 Iowa, 527. The court cited with approval the former case of *Barney v. McCarty*, 15 Iowa, 510, 83 Am. Dec. 427, and

a deed had been filed for record, and had remained in the recorder's office from the time it was filed, but it had never been actually recorded or indexed. The court held that the mere filing was not sufficient to impart constructive notice.<sup>1</sup> The court decided this case on the authority of *Barney v. McCarty* and said: "The only point of difference between the facts in that case and the one at bar is, that while the instrument there was copied upon the record, and taken from the recorder's office, here it was not copied, and remained in the office. The doctrine of that case is clearly applicable to this. If the recording of an instrument duly filed is insufficient without an index thereof, certainly filing without either the index or the recording would, under that decision, fail to impart notice."<sup>2</sup> A purchaser of a piece of land executed a mortgage back as security for the payment of the purchase money. But by mistake the land that was described was an entirely different tract. It was held that a subsequent purchaser was not charged with constructive notice of the recitals in the deed, which might be sufficient to place him upon inquiry, when the index required by law to be kept did not contain such recitals.<sup>3</sup> But a description in the proper column in the index as "certain lots of land," the record being complete in other respects, was held sufficient to convey constructive notice to subsequent pur-

said: "It is a purchaser's duty to examine the records. The law places this means at his disposal. It requires all matters affecting titles to appear of record. If he omits to examine, he is to impute the loss, if any, to his own indolence or folly: *Astor v. Wells*, 4 Wheat. 466. Assuming the instrument to be one which may properly be registered, the law charges him with a knowledge of all facts which an ordinarily careful examination of the records would have made him cognizant of. Having thus settled the rule which is to be applied, the court cannot avoid the conclusion that if the appellants, in the case under consideration, had made an ordinary, diligent, skillful, and careful examination of the records, the mortgage in question would have been discovered to them."

<sup>1</sup> *Whalley v. Small*, 25 Iowa, 184. See, also, *Oconto Co. v. Jerrard*, 46 Wis. 317.

<sup>2</sup> *Whalley v. Small*, 25 Iowa, 184.

<sup>3</sup> *Scoles v. Wilsey*, 11 Iowa, 261.

chasers.<sup>1</sup> And it was also held that where the words "see record" were written in the column in which the description of the lands should have been placed, a subsequent purchaser was charged with notice.<sup>2</sup>

**§ 695. View that mistake in index has no effect upon record.**—In Missouri, although the rule prevails that a deed does not impart constructive notice if a mistake has been made in the record,<sup>3</sup> yet it is established that this result does not follow from a mistake or omission in the index.<sup>4</sup> Wagner, J., referring to the registry act of that State, said: "The general nature, object, and scope of the whole act, taken together, is to point out the duty of the clerk, not only in the making of a proper record of conveyances, but also in furnishing facilities for their discovery, examination, and use, by all persons interested in them; and to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them. The index, which it is the duty of the clerk to make out and preserve in a book for that purpose, seems to be one of the facilities to be used in making search for the record, but not a part of the record itself. It is his duty to have an index, and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so, he is liable to the party aggrieved for double the amount of damages sustained. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be held void.

<sup>1</sup> *Bostwick v. Powers*, 12 Iowa, 456.

<sup>2</sup> *White v. Hampton*, 13 Iowa, 259. For other cases in Iowa upon this question, see *Calvin v. Bowman*, 10 Iowa, 529; *Noyes v. Horr*, 13 Iowa 570; *Barney v. Little*, 15 Iowa, 527; *Gwynn v. Turner*, 18 Iowa, 1; *Howe v. Thayer*, 49 Iowa, 154; *Hiles v. Atlee*, 80 Wis. 219; 27 Am. St. Rep. 82; 49 N. W. Rep. 816.

<sup>3</sup> *Terrell v. Andrew County*, 44 Mo. 309.

<sup>4</sup> *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Land & River Imp. Co. v. Bardou*, 45 Fed. Rep. 706. Filing a deed, it is held in North Carolina, constitutes constructive notice, and the failure of the officer to index the deed as required by statute does not impair its efficacy: *Davis v. Whitaker*, 114 N. C. 279; 41 Am. St. Rep. 793.

The purchaser may take his deed, relying solely upon the representations or covenants of his grantor, without desiring to examine the records. An index or the want of it will obviously be of no importance to him. So, if without making any search, or causing any to be made, a person should rely alone upon the representations of the clerk, that the title was clear, and these representations should be knowingly false, could it with reasonable propriety and fairness be said that he was injured by want of an index? Yet in these cases, if the argument advanced be correct, though no one is injured by the failure of the clerk to perform his duty as to indexing, and though the purchaser has had his deed correctly transcribed and spread upon the record, still the recording should be held void. In my opinion, the proper office of the index is what its name imports—to point to the record—but that it forms and constitutes no part of the record. The statute states, without reserve or qualification, that when an instrument is filed with the recorder and transcribed on the record, it shall be considered as recorded from the time it was delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section for the purpose of facilitating research, besides recording, devolves a separate, distinct, and independent duty upon the recorder, and in the event of a noncompliance with that duty, the party injured has his redress. The purchaser or grantee, when he has delivered his deed and seen that it was correctly copied, has done all the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that officer for his injury.”<sup>1</sup> In Georgia, the court considered that the index was intended for the convenience of the searcher. “If the clerk fails to do his duty, he injures those who desire to search. The duty is, therefore, to the searcher and to the public, and not to the holder of the deed. And this has, as we think, always been

<sup>1</sup> In *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533.

the understanding of the law in this State.”<sup>1</sup> The rule that generally prevails is, that the index is not a part of the record, and that a grantee cannot suffer for any mistake in it.<sup>2</sup>

§ 696. **Comments.**—In those States where a mistake in the record does not affect its power of imparting constructive notice, a mistake in the index cannot injure the grantee. In Iowa, the decisions are founded upon the express language of the statutes of that State. We think that whether the law requires an index to be kept or not, a grantee who has deposited his deed for record should not suffer for a mistake of the officer. As we have already said, we consider the true principle to be, unless the language of the statute necessarily leads to a different conclusion, that the obligation of the grantee as to giving notice ceases when he has filed his deed for record. For any mistake made in the index or record by the officer, the

<sup>1</sup> Chatham v. Bradford, 50 Ga. 327; 15 Am. Rep. 692.

<sup>2</sup> Gilchrist v. Gough, 63 Ind. 576; 30 Am. Rep. 250; Musgrove v. Bonser, 5 Or. 313; 20 Am. Rep. 737; Board of Commrs. v. Babcock, 5 Or. 472; Green v. Carrington, 16 Ohio St. 548; 91 Am. Dec. 103; Lincoln Building & Sav. Assn. v. Hass, 10 Neb. 581; Curtis v. Lyman, 24 Vt. 338; 58 Am. Dec. 174; Chatham v. Bradford, 50 Ga. 327; 15 Am. Rep. 692; Nichol v. Henry, 89 Ind. 54; Barrett v. Prentiss, 57 Vt. 297; Bedford v. Tupper, 30 Hun, 174; Stockwell v. McHenry, 107 Pa. St. 237; 52 Am. Rep. 475; Swan v. Vogel, 31 La. Ann. 38; Semon v. Terhune, 40 N. J. Eq. 364; Oconto Co. v. Jerrard, 46 Wis. 317; Ely v. Wilcox, 20 Wis. 523; 91 Am. Dec. 436; Fallas v. Pierce, 30 Wis. 443; Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 381. In Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 881, Mr. Justice Smith, after stating this rule, said: “In reaching this conclusion, I have not overlooked the practical inconveniences that may result from it in searching records. But the duty of the court is only to declare the law as the legislature has laid it down. Arguments *ab in convenienti* may sometimes throw light upon the construction of ambiguous or doubtful words; but where, as here, the language of the law makes it plain, they are out of place. Inconveniences in practice will result, whichever way the question shall be decided. The power to remedy them is in the legislature, and not in the courts. Even as the law now stands, the party injured by the omission of the clerk is not without remedy, for he has his action against the clerk.” As to what an index of records should contain, see Smith v. Royalton, 53 Vt. 604. See, also, supporting text, Stockwell v. McHenry, 107 Pa. St. 237; 52 Am. Rep. 475; Barrett v. Prentiss, 57 Vt. 297; Swan v. Vogel, 31 La. Ann. 38.

grantee should not be held responsible, but the loss should fall upon the subsequent purchaser, who may have his remedy against the recording officer for the negligent performance of an official duty.<sup>1</sup>

**§ 697. Liability of recording officer for error.**—As it is the duty of the recording officer to duly index and record the deed, he is liable in damages to the party injured for a breach of this duty. The only question that can arise is, who is the party aggrieved? It would probably be held in those States where it is considered that a deed is not duly recorded unless properly copied upon the record-book, that it would be the grantee, who, by this view, is the one sustaining the injury.<sup>2</sup> But generally the claim to damages would accrue to the party who purchased upon the assurance that the records were correct.<sup>3</sup>

<sup>1</sup> In *Ritchie v. Griffiths*, 1 Wash. 429, 22 Am. St. Rep. 155, the court holds that under the statute of that State the index is an essential part of the record, and says: "While it is true that Devlin in his work on Deeds, section 696, seems to imply that an index is not necessary to give constructive notice, yet he evidently bases the idea, not so much on the theory that the index is not a part of the record, as from his general conclusion that the obligation of the grantee as to notice ceases when he has filed his deed for record. And he qualifies this general statement by saying: 'Unless the language of the statute necessarily leads to a different conclusion'—a qualification, it seems to us which renders meaningless the general statement; for as constructive notice is purely statutory, it must necessarily follow that it is 'the language of the statute' that leads to one or the other of the conclusions. He cites *Barney v. Little*, 15 Iowa, 527, but says that 'the decision in that case was founded upon the express language of the statute of that State,' intimating that in consideration of the statute the conclusion of the court was correct; and in as much as our statutes make the index a more important factor in the system of registration than does the Iowa statute, we may fairly conclude that under a statute like ours the learned author would consider the index an essential part of the record." It is impossible to lay down any general rule, as each State provides its own methods for registering instruments affecting title to land, and the courts of each State construe their own statutes.

<sup>2</sup> See *Terrell v. Andrew County*, 44 Mo. 309. The clerk's failure to copy the description correctly will not prejudice the grantee, as the deed is constructive notice from the time it is filed for record: *Lewis v. Hinman*, 56 Conn. 55.

<sup>3</sup> *Board of Commissioners v. Babcock*, 5 Or. 472; *Mutual Life Ins. Co.*



The statute of Missouri requires the recorder to keep an index, and declares that if he fails or refuses to provide and keep in his office an index of the character required, he shall pay to the aggrieved party double the damages caused thereby. But the court intimated that if a purchaser takes his deed, without attempting to examine the records, relying exclusively upon the representations or covenants of his grantor, or should rely solely upon the representations of the officer that the title was perfect and free from encumbrances, it could not with reasonable propriety and fairness be said that such purchaser was injured by the want of an index.<sup>1</sup> In Indiana, where the view obtains that the record of a deed is notice of the existence and record of the deed, and not of the original instrument, a deed containing an agreement on the part of the grantee to assume and pay the sum of five hundred dollars as a part of the mortgage debt on the land conveyed, was, by the recorder's mistake, recorded in such a manner as to show the assumption on the part of the grantee of only two hundred dollars of such mortgage debt. The recorder and his sureties were held to be liable upon the officer's official bond for the damages which the grantor sustained by such mistake.<sup>2</sup> But where the deed is forged, unless the recording officer was aware of the forgery he is not liable for recording it.<sup>3</sup>

**§ 698. Correction of mistake in record.**—The officer who has recorded the deed has the power to correct any mistake made in copying the deed into the record.

*v. Dake*, 1 Abb. N. C. 381; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533.

<sup>1</sup> *Bishop v. Schneider*, 46 Mo. 472, 479; 2 Am. Rep. 533. See further as to the liability of the recording officer for damages for mistakes, *Gilchrist v. Gough*, 63 Ind. 576; 30 Am. Rep. 250; *Hunter v. Windsor*, 24 Vt. 327; *Crews v. Taylor*, 56 Tex. 461; *Lee v. Birmingham*, 30 Kan. 312; *Mangold v. Barlow*, 61 Miss. 593; 48 Am. Rep. 84; *State v. Davis*, 96 Ind. 539; *Board of Commissioners v. Babcock*, 5 Or. 472; *Poplin v. Mundell*, 27 Kan. 138; *Fox v. Thibault*, 33 La. Ann. 32; *Walkins v. Wilhoit*, 104 Cal. 395.

<sup>2</sup> *State v. Davis*, 96 Ind. 539.

<sup>3</sup> *Ramsey v. Riley*, 13 Ohio, 157.

book.<sup>1</sup> But where the view prevails that subsequent purchasers are charged with notice of such facts only as the records disclose, the corrections cannot affect the rights of a purchaser without notice of the mistake, who became such before the correction was made. Thus, where a grantee had his deed recorded, but by mistake the number and description of the lots conveyed were omitted in the record, and another person afterward bought the same lots of the same grantor, and subsequently the record of the first grantee's deed was amended by interlineation of the description, it was held that the interlineation could impart notice only from the time it was made, and hence that the second grantee had no notice of the previous conveyance of the property.<sup>2</sup> But under the statute in California, providing for the filing in the office of the recorder a duplicate of a sheriff's certificate of sale, it was held where such duplicate was deposited by the sheriff with the recorder, and marked as filed by the latter, but was recorded in a book of deeds as a deed, and regularly indexed as such, and afterward placed in a file of recorded deeds, where it remained for a number of years, that it imparted notice to subsequent purchasers.<sup>3</sup>

**§ 699. Reformation of deed—Correcting record.**—A court has not power to order the erasure of words from a deed, or to order the recorder to alter his record when he has correctly copied the deed. This is not the proper mode of reforming a deed. If words are inserted in a deed which the parties did not intend to insert, or if words are omitted which the parties intended to insert,

<sup>1</sup> *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260; *Baldwin v. Marshall*, 2 Humph. 116; *Sellers v. Sellers*, 98 N. O. 13; 3 S. E. Rep. 917.

<sup>2</sup> *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260. See *Barnard v. Campan*, 29 Mich. 162; *Harrison v. Wade*, 3 Cold. 505. It has been held, however, that the recording officer cannot correct the record. See *Jennings v. Dockham*, 99 Mich. 253; 58 N. W. Rep. 66; *Foster v. Dugan*, 8 Ohio, 87; 31 Am. Dec. 432; *Farmer's & Mechanic's Bank v. Bronson*, 14 Mich. 361; *Burton v. Martz*, 38 Mich. 761.

<sup>3</sup> *Page v. Rogers*, 31 Cal. 293. Mr. Justice Shafter, however, dissented.

the court should find that there was a mistake, and in what it consisted.<sup>1</sup> The usual and most appropriate method of correcting a deed, is for the court in its decree of reformation to require the grantor to make a new deed in accordance with the decree. If, however, this course is inconvenient, a commissioner should be appointed to carry out the decree. When the new deed is recorded, a note should be made on the margin of the record of the first deed, stating the reformation and showing in what place upon the record the new deed can be found.<sup>2</sup>

§ 700. **Copy of seal.**—A record is not vitiated by the omission to record the seal or to indicate in some manner that a seal was attached to the instrument.<sup>3</sup> “The object of registration of a deed is to give notice to the public of the fact that the title to the property has passed from the vendor, and thereby prevent others from dealing with him as the owner. The conveyance itself is required to be copied into the record, in order that parties may determine its sufficiency and the character of the estate conveyed. To accomplish this end it is not necessary that the seal should be copied upon the book; it is enough if it appear from the record that the instrument copied is under seal.”<sup>4</sup> A certified copy of a deed from the recorder’s office contained in the margin of the certificate

<sup>1</sup> *Toops v. Snyder*, 47 Ind. 91.

<sup>2</sup> *King v. Bales*, 44 Ind. 219.

<sup>3</sup> *Geary v. City of Kansas*, 61 Mo. 378; *Hadden v. Larned*, 87 Ga. 634; *Thorn v. Mayer*, 33 N. Y. Sup. 664. This section is cited as authority in *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106. See, also, *Griffin v. Sheffield*, 38 Miss. 359; 77 Am. Dec. 646; *Gale v. Shillock*, 4 Dak. 182; 29 N. W. Rep. 666; *Hammond v. Gordon*, 93 Mo. 223; *Ballard v. Perry*, 28 Tex. 347; *Witt v. Harlan*, 66 Tex. 660; *Coffee v. Hendricks*, 66 Tex. 676. A seal may be presumed from the attestation clause: *Macey v. Stark*, 116 Mo. 481; 21 S. W. Rep. 1088; *Reussens v. Staples*, 52 Fed. Rep. 91; *McCoy v. Cassidy*, 96 Mo. 429; *Carrington v. Potter*, 37 Fed. Rep. 767; *Todd v. Union Dime Sav. Inst.* 118 N. Y. 337. See § 247, *ante*.

<sup>4</sup> *Smith v. Dall*, 13 Cal. 510, per Terry, C. J. See, also, *Growning v. Behn*, 10 B. Mon. 383; *Beardsley v. Day*, 52 Minn. 451; 55 N. W. Rep. 46; *Heath v. Big Falls Cotton Mills*, 115 N. C. 202; 20 S. E. Rep. 369; *Aycock v. Raleigh etc. R. R. Co.*, 89 N. C. 321.

of acknowledgment taken before a notary, and in the place where a seal is usually affixed, the words "no seal," written in brackets in this manner: [No seal.] The concluding clause of the certificate was in the usual form: "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year first above written." The lower court refused to receive the copy of the deed in evidence, on the ground that the certificate did not contain the seal of the notary. But on appeal the supreme court held that this ruling was error, and that the words "no seal" did not imply that no seal was affixed, but were a mere note by the recorder of the place of the notary's seal, which he was unable to copy.<sup>1</sup> Under the statute in Missouri, the registration of a mortgage, although no seal or scrawl is attached, nevertheless imparts notice. The registration law in that State is considered as intending to embrace, not only legal conveyances, but also every instrument in writing affecting the legal or equitable title to land.<sup>2</sup>

**§ 701. Filing deed with person in charge of office.—** A person who causes his deed to be placed on file for record in the office provided for the registration of deeds, by depositing it with the person in charge of the office, and paying the legal fee, does all that the law requires. It is not necessary that the deed should be delivered to the recorder or a regular deputy. It is sufficient that the deed was deposited with the person who has the actual control of the office, as the recording officer is responsible for the

<sup>1</sup> *Jones v. Martin*, 16 Cal. 166. This case is cited in *Geary v. City of Kansas*, 61 Mo. 378, and the court say of it: "We think there was no error in this ruling." See, also, *Hedden v. Overton*, 4 Bibb. 406; *Griffin v. Sheffield*, 38 Miss. 359; 77 Am. Dec. 646; *Sneed v. Ward*, 5 Dana, 187; *Ingoldsby v. Juan*, 12 Cal. 564. But see *Switzer v. Knapps*, 10 Iowa, 72; 74 Am. Dec. 375, where it is held that "where the record of a deed does not show a copy of the seal, as such copies are usually made in records, the presumption is that there was no seal in the original." And see, also, holding substantially the same, *Todd v. Union Dime Savings Institution*, 118 N. Y. 337; *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374.

<sup>2</sup> *McClurg v. Phillips*, 57 Mo. 214.

acts of one thus permitted to assume possession of the keys and papers of his office.<sup>1</sup> The agent of a grantee was directed to take the deed to the recorder's office for record. This was done, and the deed was delivered to a person who was acting as recorder. The latter made the proper indorsements upon the deed, three days before the entry of judgment against the grantor in the deed. It was held that the delivery to the person in charge of the office was sufficient, and the deed was entitled to precedence over the judgment.<sup>2</sup> Mr. Justice Treat said of this delivery that "this was all a prudent man would deem necessary or advisable. No laches can be imputed to the grantees. They were not required to ascertain who was the recorder *de jure*. It was sufficient to ascertain who was in possession of the records and discharging the duties of the office."<sup>3</sup>

§ 702. **Comments.**—The reason for this rule is manifest. A person is not compelled to enter into an examination of the appointment of one acting as a deputy. He is not required to ascertain whether such person has taken the oath of office, filed a bond, if necessary, or complied with other provisions of the statute. The officer by placing him in charge becomes accountable for his acts. Even if the officer is not allowed by law to appoint a deputy, the punishment for a neglect to attend personally to the duties of his position should be against him, and

<sup>1</sup> Dodge v. Protter, 18 Barb. 193, 202; Cook v. Hall, 1 Gilm. (6 Ill. 575; Oats v. Walls, 28 Ark. 244; Bishop v. Cook, 13 Barb. 326. See Bosley v. Forquar, 2 Blackf. 61, 63; Deming v. Miles, 35 Neb. 739; 37 Am. St. Rep. 464.

<sup>2</sup> Cook v. Hall, 1 Gilm. (6 Ill.) 575.

<sup>3</sup> Cook v. Hall, *supra*. In Bishop v. Cook, 13 Barb. 328, Welles, J., with reference to a chattel mortgage which the statute declared should be void as against creditors, unless it or a true copy of it should be filed in the office of the town clerk, said: "The filing consisted in presenting the mortgage at the office and leaving it there, and depositing it in the proper place with the papers in the office. This was done in the proper case, and was all the appellant under the circumstances could do, and all the law required of him. Although there was no town clerk *de jure*, there was a town clerk's office and a town clerk *de facto*."

should not be placed upon a person doing business with the office. Practically, if the person in charge actually files the instrument, and it is subsequently correctly copied into the record, no inconvenience can arise, or damage be done. But a case may be imagined, though it does not seem to have arisen, or at least has not come within our observation, where the person in charge failed to record the instrument at all, and subsequent purchasers are thus misled. It would probably be held that in such an event the same rule should apply as would were such person the officer himself.

**§ 703. Registration of deeds when State is in rebellion.**—Where a person is acting under a *de facto* government, if it is of paramount force in the county within which he performs the duties of his office, his official acts, notwithstanding that such government is unlawful and revolutionary, are valid and binding, if not done for the purpose of assisting the war power of the unlawful government. Hence, the registration of a deed by an officer who continued to act as such after the State had passed an ordinance of secession, and while the county in which he exercised his functions was under the military power of the confederate government, is a valid recordation.<sup>1</sup> Chief Justice Waite, without attempting to give any exact definitions within which the acts of the government of a State in rebellion should be treated as valid or invalid, observed, upon the general subject: "It may be said, perhaps, with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid, if emanat-

<sup>1</sup> *Henning v. Fisher*, 6 W. Va. 238. But see the earlier cases in that State of *Brown v. Wylie*, 2 W. Va. 502; 98 Am. Dec. 781; *Calfee v. Burgess*, 3 W. Va. 274.

ing from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.”<sup>1</sup>

**§ 704. Payment of fees.**—An officer is not required to receive a deed, or to permit it to be filed in his office for registration, until all fees he is authorized to collect have been paid. But if he sees proper to permit a deed to be deposited with him without the payment of the tax upon it, he must record it, and must look for the payment of the tax to the person for whom he records the deed. By receiving the deed for record without objection, it is presumed that he dispenses with the previous payment of the tax, and the person depositing the instrument has a right to assume that it will be duly recorded.<sup>2</sup> A provision in a statute that “no deed shall be admitted to record until the tax is paid thereon,” is merely directory. If the officer records the deed without the payment of the tax, the record is not invalidated, but he assumes the tax.<sup>3</sup>

**§ 705. Proof of time at which deed is recorded.**—The certificate of the recorder is generally regarded as conclusive proof of the time at which a deed is deposited for record. “It is the date of the reception and record, and not the order in which the entry is made, that is to be relied upon as giving notice of priority. The record is the instrument of notice to subsequent purchasers of the state

<sup>1</sup> In *Texas v. White*, 7 Wall. 700, 733. See, also, *Harrisons v. Farmers' Bank of Virginia*, 6 W. Va. 1; *Griffin v. Cunningham*, 20 Gratt. 31; *Sherfy v. Argenbright*, 1 Heisk. 128; 2 Am. Rep. 690; *Thorington v. Smith*, 8 Wall. 1.

<sup>2</sup> *Bussing v. Crain*, 8 Mon. B. 593; *Ridley v. McGehoe*, 2 Dev. 40; *People v. Bristol*, 35 Mich. 28.

<sup>3</sup> *Lucas v. Clafflin*, 76 Va. 289. See, also, *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. Where the register refuses to record the deed until his fees are paid, the leaving of the deed with him is held not to be constructive notice: *Cunningham v. Peterson*, 109 N. C. 33.



of the title; and to permit it in any manner to be affected by parol or extraneous evidence would not only destroy its value for that purpose, but would convert it into an instrument for deception. It would be dangerous to the rights of all subsequent purchasers, and contrary to the established rules of evidence, to admit any of the testimony offered to explain or vary the record."<sup>1</sup> But the certificate is not conclusive of the fact that the instrument has been properly recorded, but only of the time of its receipt by the recording officer.<sup>2</sup> But when the register has failed to note the time at which it was received for record, such time may be proved by parol evidence.<sup>3</sup>

**§ 706. Withdrawing deed filed for record.**—If a deed is withdrawn from the office of the recorder before it is actually recorded, its priority is lost.<sup>4</sup> A person executed a mortgage and filed it for record the same day. He afterward obtained possession of it before it was actually spread upon the records, and, while it was out of the recorder's possession, he sold the premises described in the mortgage. The purchaser had his deed recorded, and,

<sup>1</sup> *Hatch v. Haskins*, 17 Me. 391, 395, per Shepley, J. See, also, *Fuller v. Cunningham*, 105 Mass. 442; *Bubose v. Young*, 10 Ala. 365; *Tracy v. Jenks*, 15 Pick. 465; *Ames v. Phelps*, 18 Pick. 314; *Wing v. Hall*, 47 Vt. 182; *Bullock v. Wallingford*, 55 N. H. 619; *Edwards v. Barwise*, 69 Tex. 84; 6 S. W. Rep. 677. But see *Horsely v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393, where it was held that parol evidence is admissible to show when a deed was recorded.

<sup>2</sup> *Thorp v. Merrill*, 21 Minn. 336; *New York Life Ins. Co. v. White*, 17 N. Y. 469; *Dubose v. Young*, 10 Ala. 365; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602. And see *Jackson v. Phillips*, 9 Cow. 94. Where the entry in the index-book in the recorder's office shows upon its face that it was not made at the time at which it was received, the presumption as to the correctness of the certificate is destroyed: *Hay v. Hill*, 24 Wis. 235.

<sup>3</sup> *Metts v. Bright*, 4 Dev. & B. 173; 32 Am. Dec. 683; *Cunningham v. Peterson*, 109 N. C. 33; 13 S. E. Rep. 714; *Boyce v. Stanton*, 15 Lea, 346.

<sup>4</sup> *Hickman v. Perrin*, 6 Cold. 135; *Turman v. Bell*, 54 Ark. 273; 26 Am. St. Rep. 35; *Johnson v. Borden*, 40 Vt. 567; 94 Am. Dec. 436; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Clamorgan v. Lane*, 9 Mo. 446. See, where liens of mortgage have not been lost, though instruments withdrawn, *Swift v. Hall*, 23 Wis. 532; *Wilson v. Leslie*, 20 Ohio, 161; *Woodruff v. Phillips*, 10 Mich. 500.

subsequently, the mortgage was returned to the recorder's office. The court held that the deed was entitled to priority if the purchaser had paid a valuable consideration.<sup>1</sup>

§ 707. **Constructive notice.**—But the purchaser may have sufficient information to put him upon inquiry, and charge him with constructive notice. Thus, if a person, when about to purchase a piece of property, is informed by the recorder that the vendor has already executed a deed of the same property to another person, which was filed for record, but was withdrawn before being recorded, this information is sufficient to put such intending purchaser upon inquiry.<sup>2</sup> To constitute notice of an adverse title to the property, it is not essential that such information should be given by a person interested in the property.<sup>3</sup>

<sup>1</sup> *Kiser v. Heuston*, 38 Ill. 252. Where a deed of trust is presented to the recorder, and is indorsed, "filed for record," and immediately afterward, and before any entry concerning it is made, is withdrawn for the purpose of having a government stamp placed upon it, and is not returned for a month or more afterward, the first filing is not sufficient to give constructive notice of the existence of the deed: *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602. See, also, *Olamorgan v. Lane*, 9 Mo. 446.

<sup>2</sup> *Lawton v. Gordon*, 37 Cal. 202.

<sup>3</sup> *Lawton v. Gordon*, *supra*. In that case Mr. Justice Rhodes, delivering the opinion of the court, said: "The purchaser received definite and certain information of the existence of Reed's deed, and this information was worthy of credit, for it came from one who had seen the deed and filed it for record. Would any reasonable man, who was contemplating the purchase of property, after having received that information, doubt as to his duty to pursue the inquiry, in order to ascertain the true condition of the title? He certainly would not hesitate, unless he was laboring under the mistake of law, that a recorded deed always took precedence of an unrecorded deed. The information itself being sufficient in all respects to put the purchaser upon his inquiry, the only remaining question is, whether the information must come from a person interested in the property? Upon this question the plaintiff cites *Leading Cases in Equity*, notes to *Le Neve v. Le Neve*, in which the writer says: 'And this rule has been stated so positively, and in such unqualified terms, under the sanction of names of great authority, as to lead to the inference that notice cannot be binding unless it proceed from a person interested in the property and in the course of the treaty for its purchase.' The rule alluded to was, that the notice must be certain; and the rule, it was said, applied emphatically to all statements which do not proceed directly from parties in interest or their agents. 'But

§ 708. **Deposit subject to further order.**—If a conveyance is left with the recording officer with instructions not to record it until he is so directed, it should not be recorded until such directions are given. This may be illustrated by a case where a mortgage was given to the recorder with directions not to place it on record until he received further directions, and the recorder's clerk recorded it without such directions having been received. It was held that under these circumstances the placing of the mortgage upon the record-book was not a registration which entitled it to priority over conveyances and encumbrances subsequently filed for record. If such directions were received, the instrument should be recorded as of that time, and not as of the time when it was left with the recorder.<sup>1</sup> And still more clear is the proposition that a deed left with the recorder with such instructions does not, before registration, afford constructive notice of its contents as though recorded.<sup>2</sup>

this doctrine,' he continues, 'must be understood as applying to notice in its limited sense, as distinguished from knowledge or such information as is substantially equivalent to knowledge. It is evident that, if it be shown that the purchaser knew of the existence of an adverse claim or title, it cannot be necessary to prove notice, and that it must be immaterial whether his knowledge was obtained from the parties interested or from third persons. The true rule, therefore, with regard to the statements of strangers and of parties in interest, would seem to be that the general statement of the existence of an adverse title, to which no weight would be due when proceeding from a stranger, will be notice when coming from the party interested; and not that *distinct and positive* information can be disregarded because the person who gives it has no interest in the property to which it relates. A purchaser cannot go on with safety to complete a purchase after learning the existence of a prior conveyance of the property by the vendor, from a person present as a witness, or even as a bystander, at the execution of the deed by which it was conveyed. And it can hardly be doubted that the same result will follow from the statement of any fact within the knowledge of the party who stated it, which shows that the title purchased is subject to the legal or equitable claims of other persons.' "

<sup>1</sup> *Brigham v. Brown*, 44 Mich. 59. See, also, *Horsley v. Garth*, 2 Gratt. 471; 44 Am. Dec. 393.

<sup>2</sup> *Haworth v. Taylor*, 108 Ill. 275; *Davis v. Whitaker*, 114 N. C. 279; 41 Am. St. Rep. 793; 19 S. E. Rep. 699; *Moore v. Bagland*, 74 N. C. 343.

**§ 709. Priority between deeds recorded on the same day.**—Generally, of two deeds, the one first filed for record is given the preference. Two deeds of trust embracing the same property were delivered to the recorder on the same day by the same person, one after the other, and they were recorded in the order in which they were delivered. It was held that where nothing appeared that one of the trust deeds was entitled to priority over the other as to the time for filing, the deed first recorded took precedence.<sup>1</sup> But where two deeds were so defectively acknowledged that neither was entitled to registration, it was held that the effect of a curative act passed subsequently was to record both deeds at the same instant of time, and hence left them to operate as at common law, by which the deed first executed would pass the title to the land described in it.<sup>2</sup> It may be shown by parol evidence which of two mortgages, signed, acknowledged, and deposited for record on the same day, was first filed for record.<sup>3</sup>

<sup>1</sup> *Brookfield v. Goodrich*, 32 Ill. 363. Said Mr. Chief Justice Oaton: "In the absence of proof to the contrary, the presumption is that the deeds were filed for record in the order in which they were handed to the recorder as the law made it his duty to do, and upon this presumption the purchasers of the several classes of bonds secured by these deeds had a right to act. The trustee in these cases is not the true purchaser, and to be protected by the recording laws, but the purchasers of the bonds are the true purchasers. It was their right and their duty to examine the record of these deeds, and there they found that the deed securing the one thousand dollar bonds was first recorded, and by our recording laws was entitled to a preference, and upon this law they could securely repose in purchasing this class of bonds, knowing that the law gave them a preference; and so, too, the purchasers of the other bonds were in duty bound to examine the same record by which they were told that these bonds were secured by a second lien upon the premises, and that they must be postponed until all the bonds secured by the deed first recorded were all paid. If they took the assurance of the seller that these bonds were secured by a first lien, that was their own folly. To make good that assurance would be a fraud upon the purchasers of the first bonds, who had a right to rely upon the law and the record, which declare that they are entitled to a first lien."

<sup>2</sup> *Deininger v. McConnel*, 41 Ill. 228.

<sup>3</sup> *Spaulding v. Scanland*, 6 Mon. B. 353. The court will take notice of the fractional parts of a day: *Lemon v. Staats*, 1 Cowen, 592; *Boone v. Telles*, 2 Bradw. (Ill.) 539.

§ 710. **Facts of which the record gives notice.**—When a conveyance has been properly recorded, the record is constructive notice of its contents, and of all interests, legal and equitable, created by its terms.<sup>1</sup> A sold land to B, and executed a bond for a conveyance upon payment of the purchase money; in the same manner B sold a portion of the land to C, and subsequently sold the residue at the same time to two persons, giving to each a bond for a title. Afterward B obtained a deed for the whole tract from A, and for the purpose of securing a part of the purchase money, executed at the same time a mortgage upon that portion of the premises which had been sold to one of the two persons purchasing last, such purchaser being then indebted on his purchase in an amount exceeding the mortgage debt. The mortgage was duly recorded, and the purchasers of the unencumbered portions of the land paid the several amounts due by them, and received deeds from B, and several years afterward the purchaser of the mortgaged premises, who had no actual notice of the mortgage, paid the sum remaining due upon his agreement, and received also a deed from B. A suit was brought to foreclose the mortgage, and the court held that the grantee of the mortgaged premises held the same in subjection to the full encum-

<sup>1</sup> *Grandin v. Anderson*, 15 Ohio St. 286; *Humphreys v. Newman*, 51 Me. 40; *Bancroft v. Consen*, 13 Allen, 50; *George v. Kent*, 7 Allen, 16; *Orvis v. Newell*, 17 Conn. 97; *Bolles v. Ohauncey*, 8 Conn. 389; *Clabaugh v. Byerly*, 7 Gill, 354; 48 Am. Dec. 575; *Bush v. Golden*, 17 Conn. 594; *Thomson v. Wilcox*, 7 Lans. 376; *Peters v. Goodrich*, 3 Conn. 146; *Harrison v. Cachelin*, 23 Mo. 117; *Kyle v. Thompson*, 11 Ohio St. 616; *Buchanan v. International Bank*, 78 Ill. 500; *Souder v. Morrow*, 33 Pa. St. 83; *Hetherington v. Clark*, 30 Pa. St. 393; *Barbour v. Nichols*, 3 R. I. 187; *Youngs v. Wilson*, 27 N. Y. 351; *Dimon v. Dunn*, 15 N. Y. 498; *Ogden v. Walters*, 12 Kan. 282; *Dennis v. Burritt*, 6 Cal. 670; *Mesick v. Sunderland*, 6 Cal. 297; *McCabe v. Grey*, 20 Cal. 509; *Montefiore v. Browne*, 7 H. L. Cas. 341; *Parkest v. Alexander*, 1 Johns. Ch. 394; *Leach v. Beattie*, 33 Vt. 195. And see *Johnson v. Stagg*, 2 Johns. 510; *Doyle v. Stevens*, 4 Mich. 87; *Tripe v. Marcy*, 39 N. H. 439; *Leiby v. Wolf*, 10 Ohio, 83. The record of a deed showing on its face that it was properly executed and acknowledged is evidence that it was in fact executed as it purports to have been, notwithstanding by reason of extrinsic facts it may be void or voidable: *Clague v. Washburn*, 42 Minn. 371.

brance of the mortgage, and that there was no vendor's lien which would render any other portion of the land liable to contribute to the discharge of the debt secured by the mortgage.<sup>1</sup> Where the whole of a lot of land is subject to a mortgage, one who takes a subsequent mortgage, with notice of a prior unrecorded deed of warranty of an adjoining portion of the same lot from the mortgagor to a third person, cannot enforce contribution from the latter toward redeeming the mortgage; and a direct reference in the mortgage to such third person as owning the adjoining land is equivalent to notice.<sup>2</sup> A purchaser received a deed for the undivided one-half of a church and lot, "together with all and singular the rights, liberties, privileges, hereditaments, and appurtenances thereunto belonging, in as full and ample a manner, and with all the same rights and conditions, authorities and agreements, with which Hugh Bellas, and Esther, his wife [the vendors], now hold the said premises as regards all or any assemblies for divine worship." Subsequently the vendee purchased the other half of the premises from the same vendor. It was held in an action of covenant to recover the purchase money, in which the vendee claimed there was a defect of title, that the first deed gave legal notice of a valid subsisting right in an assembly for divine worship.<sup>3</sup> If the conveyances under which a grantee holds refer to previous deeds containing restrictions as to the use of the property, and those deeds are recorded, he will, although he may not have express notice of these restrictions, be deemed in law to have such notice, and will be bound in the same manner as though the restrictions were contained in the deed made to him.<sup>4</sup>

<sup>1</sup> *Grandin v. Anderson*, 15 Ohio St. 286.

<sup>2</sup> *George v. Kent*, 7 Allen, 16.

<sup>3</sup> *Bellas v. Lloyd*, 2 Watts, 401.

<sup>4</sup> *Gilbert v. Peteler*, 38 Barb. 488. The facts of the case cited pertinent to this point are thus stated by the court: "The premises to which this controversy relates consists of two parcels; one, the westerly portion, designated in the report of the referees the hotel plat; the other, or easterly part, designated the Bartlett plat. There is no question of the ability

**§ 710 a. Presumption of knowledge of rights of others.**—It is presumed that a purchaser has examined every deed and instrument affecting the title. He is

of the plaintiff to convey a good title to the former of these. The two parcels were contracted to be sold together, however, and as one piece of land. They are not distinguished in the contract, but Gilbert agrees to sell and convey to Peteler lands in New Brighton lying between certain streets, and including all these premises. The plaintiff's title to the whole property is derived from one Fox. Fox obtained his title by two conveyances. One was from a person named Davis, dated October 14, 1846, of the hotel plat. This was an absolute deed, and conveyed a perfect and unqualified title. This Davis was originally the owner of the whole, and his title was absolute in fee. But on the 14th of September, 1846, before his deed to Fox, Davis had conveyed what was afterward known as the Bartlett plat to Edwin Bartlett. The deed from Davis to Bartlett was absolute, like the other, and contained no restriction. But it appears that Bartlett took this title at the request of one John C. Green, who was the owner of certain adjoining premises which he desired to protect. Green advanced the purchase money, and Bartlett held the title for him, and subject to his direction, although there was no written evidence of the arrangement. On the 30th of October, 1846, Bartlett, at Green's request, and by his direction, conveyed the strip of which he thus held the title to Fox, who was already, by Davis' deed, the owner of the residue. This deed of Bartlett contained a provision in the form of a covenant by the party of the second part (Fox) his heirs, executors, administrators, and assigns, to and with Bartlett, his heirs and assigns, not to erect or permit to be erected at any time thereafter, on any part of the premises, any building whereby the view or prospect of the bay from the dwelling-house of John C. Green could be obstructed or impaired, unless Green should first destroy his own prospect by building on his own lot. The deed added a clause of forfeiture in favor of Green in the event of a breach of this covenant. It was not signed or executed by Fox. Fox afterward conveyed to Theodosius O. Fowler, subject to this covenant, and to an express stipulation by Fowler to observe it. Fowler conveyed to Victor Forgeaud, subject to the same covenant and stipulation. Forgeaud obtained also a release and quitclaim of title from Green, but with a clause preserving the restriction as to building, etc. At or about this time there was erected a stone cottage upon the Bartlett lot, and Green afterward, by a deed reciting that he was the person for whose benefit the restriction was imposed, released Forgeaud from the restriction as to the land occupied by this cottage, but with a proviso that this should not remove the restriction or impair his rights as to the residue of the premises. After this Forgeaud conveyed to August Belmont, by a deed containing an express covenant on the part of Belmont to abide by the restrictions in the deed to Forgeaud; this latter deed, however, like the others, not being signed by the grantee. Belmont conveyed to Vanderbilt by a deed in similar terms. From Vanderbilt the title passed to the plaintiff by various mesne conveyances, none of which contained any express covenant or



charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. If a mortgagee holding the mortgage in trust for another, releases it before it becomes due, in violation of the terms of the trust, subsequent purchasers are still bound by the mortgage, because they are deemed to know that the trustee had no such authority.<sup>1</sup> Where a deed from a corporation, under which a purchaser claims title, shows on its face that it was made in consideration of real for personal property, and the corporation was not authorized by its charter to convey lands for a consideration of this kind, such purchaser is not considered an innocent one, the recitals in the deed affecting all persons claiming under it with notice that the act was in excess of the power of the corporation.<sup>2</sup>

**§ 711. Notice of unrecorded deed from notice of power of sale.**—Where a trust deed or a mortgage with a power of sale is recorded, subsequent purchasers are compelled to inquire if any sale has been made under the power. If a sale has been made by virtue of the power, although the deed has not been recorded, a subsequent purchaser from the mortgagor does not acquire the estate. The equity of redemption is cut off by the sale, notwithstanding the deed may not be recorded.<sup>3</sup> “The recording of the

restriction, but all of which referred to the deed from Vanderbilt to his next grantee, which latter deed referred to the deed from Belmont to Vanderbilt, which contained the restriction.” The court, accordingly, held that plaintiff must be charged with notice of such restriction and its consequences. See, also, *White v. Foster*, 102 Mass. 375; *Jacques v. Short*, 20 Barb. 269; *Acer v. Westcott*, 46 N. Y. 384; 7 Am. Rep. 355; *Hamilton v. Nutt*, 34 Conn. 501; *Sigourney v. Munn*, 7 Conn. 324; *Baker v. Mather*, 25 Mich. 51; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Anderson v. Layton*, 3 Bush, 87. And see *Bazemore v. Davis*, 55 Ga. 504; *Bell v. Twilight*, 18 N. H. 159; 45 Am. Dec. 367; *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301; 32 Am. St. Rep. 554.

<sup>1</sup> *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826.

<sup>2</sup> *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416; 34 Am. St. Rep. 815.

<sup>3</sup> *Heaton v. Prather*, 84 Ill. 330.

trust deed gave notice of its existence to subsequent claimants of the equity of redemption, and pointed out the source of information of what might be done in pursuance of the deed, and they were bound to take notice of the proceedings thereunder.”<sup>1</sup> Where the provisions of a mortgage or trust deed require for their execution that the trustees should have an estate in fee simple, and such mortgage or trust deed has been recorded in full, the record, though words of inheritance have been inadvertently omitted from the instrument, is notice that it was intended to pass the fee.<sup>2</sup>

**§ 712. Record is not notice to prior parties.**—The rule to be deduced from the authorities is, that only those whose duty it is to search for a deed are charged with notice by its record. The expression is frequently used that the record of a deed is a constructive notice “to all the world.” But Mr. Justice Sharswood very justly says that this assertion is “too broad and unqualified an enunciation of the doctrine. It is constructive notice only to those who are bound to search for it; thus subsequent purchasers and mortgagees, and perhaps all others who deal with or on the credit of the title, in the line of which the recorded deed belongs. But strangers to the title are in no way affected by it.”<sup>3</sup> Hence, a purchaser at a sheriff’s sale, who does not claim under a deed made between third persons, is not affected with notice by the registration of such deed.<sup>4</sup> “If conveyances from one stranger to another would be notice to all the world, miserable would be the situation of the purchaser. The registering act would afford him no protection because it would give him no notice.”<sup>5</sup> If a mortgage of land is

<sup>1</sup> *Farrar v. Payne*, 73 Ill. 82, 88, per Sheldon, J.

<sup>2</sup> *Randolph v. N. J. West Line R. R. Co.*, 28 N. J. Eq. (1 Stewt.), 49. And see, also, *Dimon v. Dunn*, 15 N. Y. 498; *Youngs v. Wilson*, 27 N. Y. 351; *Hickman v. Perrin*, 6 Coldw. 135; *Bright v. Buckman*, 39 Fed. Rep. 243.

<sup>3</sup> *Maul v. Rider*, 59 Pa. St. 167, 171.

<sup>4</sup> *Keller v. Nutz*, 5 Serg. & R. 245.

<sup>5</sup> *Duncan, J.*, in *Keller v. Nutz*, *supra*.

executed, and a right of way is reserved in a deed of the same land made subsequently, the right is held subject to the title of the mortgagee. It is destroyed by a sale under the mortgage.<sup>1</sup> "The whole object of the recording acts is to protect subsequent purchasers and encumbrances against previous deeds, mortgages, etc., which are not recorded, and to deprive the holder of the prior unregistered conveyance or mortgage of the right which his priority would have given him at the common law. The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor or mortgagor."<sup>2</sup> The actual possession of land by a purchaser holding a bond for a deed, is notice to all of his rights. The recording of a subsequent deed or mortgage affords no notice whatever to such prior purchaser. If he has no actual notice of a subsequent conveyance, he may, without incurring any liability to a subsequent vendee or mortgagee, make the payment agreed upon to his vendor.<sup>3</sup>

**§ 713. Record is notice only to purchasers under same grantor.**—Courts, frequently, in cases where it is not necessary that they should speak with precision of what persons are embraced under the category of subse-

<sup>1</sup> *King v. McCully*, 38 Pa. St. 76.

<sup>2</sup> Chancellor Walworth in *Stuyvesant v. Hall*, 2 Barb. Ch. 151, 158. See, also, *James v. Brown*, 11 Mich. 25; *Straight v. Harris*, 14 Wis. 509; *Deuster v. McCamus*, 14 Wis. 307; *Birnie v. Main*, 29 Ark. 591; *Kyle v. Thompson*, 11 Ohio St. 616; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Doolittle v. Cook*, 75 Ill. 354; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Hill v. McCarter*, 27 N. J. Eq. 41; *Blair v. Ward*, 2 Stockt. Ch. 126; *Halstead v. Bank of Kentucky*, 4 Marsh. J. J. 558; *Dennis v. Burritt*, 6 Cal. 670; *Taylor v. Maris*, 5 Rawle, 51; *Iglehart v. Crane*, 42 Ill. 261; *George v. Wood*, 9 Allen, 80; 85 Am. Dec. 741; *Ward's Exr v. Hague*, 25 N. J. Eq. 397; *McCabe v. Grey*, 20 Cal. 509; *Leiby v. Wolf*, 10 Ohio, 83; *Cooper v. Bigly*, 13 Mich. 463; *King v. McVickar*, 3 Sand. 392; *Westbrook v. Gleason*, 14 Hun. 245; *Truscott v. King*, 6 Barb. 346; *Raynor v. Wilson*, 6 Hill, 469; *Van Orden v. Johnson*, 14 N. J. Eq. 376; 82 Am. Dec. 254; *Wheelwright v. De Peyster*, 4 Edw. Ch. 232; *Tarbell v. West*, 86 N. Y. 280; *Stuyvesant v. Hone*, 1 Sand. Ch. 419.

<sup>3</sup> *Doolittle v. Cook*, 75 Ill. 354.

quent purchasers, declare in somewhat comprehensive terms that subsequent purchasers are bound by all the information they might obtain from an examination of the records. But the subsequent purchasers of whom the law speaks are those claiming title under the same grantor, and it is to these only that the record is constructive notice.<sup>1</sup> If a purchaser of land actually knows that another person has a prior deed for the same land, this mere fact is not sufficient to put him upon inquiry as to the title of the grantor of such prior purchaser. When he has no other information, the subsequent purchaser may rely on the presumption that the title of the prior purchaser, whatever it may be, is on record, as the law requires it should be, and may act on the assumption that such prior purchaser has no title if the records disclose none.<sup>2</sup> Hence, where

<sup>1</sup> *George v. Wood*, 9 Allen, 80; 85 Am. Dec. 741; *Calder v. Chapman*, 52 Pa. St. 359; 91 Am. Dec. 163; *Long v. Dollarhide*, 24 Cal. 218; *Hager v. Spect*, 52 Cal. 579; *Kerfoot v. Cronin*, 105 Ill. 609; *Baker v. Griffin*, 50 Miss. 158; *Woods v. Farmere*, 7 Watts, 382; 32 Am. Dec. 772; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Odle v. Odle*, 73 Mo. 289; *Tilton v. Hunter*, 24 Me. 29; *Brock v. Headen*, 13 Ala. 370; *Blake v. Graham*, 6 Ohio St. 580; 67 Am. Dec. 360; *Lightner v. Mooney*, 10 Watts, 407; *Bates v. Norcross*, 14 Pick. 224; *Embury v. Conner*, 2 Sandf. 98; *Keller v. Nutz*, 5 Serg. & R. 246; *Murray v. Ballou*, 1 Johns. Ch. 566; *Hetherington v. Clark*, 30 Pa. St. (6 Casey), 393; *Crockett v. Maguire*, 10 Mo. 34; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Hoy v. Bramhall*, 19 N. J. Eq. (4 Green, C. E.) 563; *Iglehart v. Crane*, 42 Ill. 261; *Leiby v. Wolf*, 10 Ohio, 80; *Blake v. Graham*, 6 Ohio St. 580; 67 Am. Dec. 360; *Whittington v. Wright*, 9 Ga. 23; *Dolin v. Gardner*, 15 Ala. 758; *Farmers' etc. Co. v. Maltby*, 8 Paige, 361; *Cook v. Travis*, 20 N. Y. 402; *Page v. Waring*, 76 N. Y. 463; *Roberts v. Bourne*, 23 Me. 165; 39 Am. Dec. 614; *Holmes v. Buckner*, 67 Tex. 107; *Huber v. Bossart*, 70 Iowa, 718; *Leach v. Beattie*, 33 Vt. 195; *Doolittle v. Cook*, 75 Ill. 354; *Cooper v. Bigly*, 13 Mich. 463; *James v. Brown*, 11 Mich. 25; *Helms v. Chadbourne*, 45 Wis. 60; *Draude v. Bohrer Mfg. Co.*, 9 Mo. App. 249; *Hill v. McCarter*, 27 N. J. Eq. 41; *Tarbell v. West*, 86 N. Y. 280; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Calder v. Chapman*, 52 Pa. St. 359; 91 Am. Dec. 163; *Traphagen v. Irwin*, 18 Neb. 195.

<sup>2</sup> *St. John v. Conger*, 40 Ill. 537. Mr. Justice Lawrence, who delivered the opinion of the court, said: "It is also urged that the subsequent deed from Schenck to Whittemore should have put the defendant, and those under whom he claims, upon inquiry as to whatever title Schenck had. This proposition in effect is, that if a person has made a deed of a

a person has no right to the land, the registry of a deed made and acknowledged by him, is not constructive notice of its execution to the true owner. "It is only notice to after-purchasers under the same grantor. To hold the proprietors of land to take notice of the record of deeds, to determine whether some stranger has without right made conveyance of their lands, would be a most dangerous doctrine, and cannot be sustained with any color of reason or authority."<sup>1</sup> The grantee in an unrecorded deed placed on record a deed of trust from himself to a third person, reciting that it was made for the purpose of securing two notes to his grantor. After the registration of the trust deed the grantor in the unrecorded deed conveyed to innocent purchasers for value, and it was held that as the trust deed was not in the chain of their title, the recording of it was not notice to them.<sup>2</sup> In the absence of fraud or actual notice, a grantee is not affected with notice of a deed fraudulently executed and recorded by a married woman under her maiden name.<sup>3</sup>

tract of land having no recorded title, he must, nevertheless, be supposed to have had some title, and subsequent purchasers must take notice of whatever title he had. Much as registry laws have been frittered away by the doctrine of putting parties upon inquiry, we do not think any court has ever gone to the extent of adopting this rule; it would substantially defeat the object of the registry laws. Their object is to provide a public record, which shall furnish, to all persons interested, authentic information as to titles to real estate, and enable them to act on the information thus acquired. This rule would require a person purchasing from one who has the title on record, to take subject to the unrecorded deeds of persons claiming under a chain of title having no connection of record with the true source of title. If such purchaser is to be held to notice of such a chain of title at all, he has the right to presume, in the absence of any other information, that whatever title the persons claiming under such chain have, is on record, as the law requires it to be, and that they have no title if the record shows none."

<sup>1</sup> *Bates v. Norcross*, 14 Pick. 224, 231.

<sup>2</sup> *Kerfoot v. Cronin*, 105 Ill. 609.

<sup>3</sup> *Draude v. Rohrer Christian Mfg. Co.*, 9 Mo. App. 249. In a recent case *Gannt, P. J.*, after reviewing the authorities says: "Our conclusion is, that a recorded deed by one who has no title, but who afterward acquires the title by recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor. We think

§ 714. **Illustrations.**—A conveyed to B two tracts of land by an absolute deed, taking a portion of the consideration in money and the balance in the notes of the purchaser. Subsequently B sold and conveyed one of these tracts to C, by a deed which was likewise absolute. But in this latter transfer no money was paid, B taking the notes of C, who had notice that B was still indebted to A. A year afterward, B, with the consent and approval of C, executed a trust deed which embraced *both* these trusts, to secure to A the amount of the purchase money remaining due him. Although C had agreed to join in this deed of trust, as a matter of fact, he did not do so. After the execution of the trust deed, C sold and conveyed the one tract he had purchased to D. The latter made no search in the recorder's office and had no actual knowledge of the trust deed, and it was held that he was a *bona fide* purchaser, unaffected by the trust deed. "The rule upon this state of facts," said the court, "is understood to be, that the purchaser of the legal title is not bound to take notice of a registered lien or encumbrance of an estate, created by any person other than those through whom he is compelled to deraign his title."<sup>1</sup> A purchaser from A, a trustee, is not charged with notice of the trust from the fact that B executed a deed to C, reciting the execution of a declaration of trust on the part of A.<sup>2</sup> Nor is the registration of a deed between third persons, notice to a purchaser at an execution sale who does not claim under such deed.<sup>3</sup> Following out the principle that a purchaser of land is not charged with constructive notice of any fact which is not connected with the course of his title, it is held that he is not pre-

that when he searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such prior deeds are not 'in the line of title,' as that term is used by conveyancers and searchers": *Ford v. Unity Church Society*, 120 Mo. 498; 41 Am. St. Rep. 711.

<sup>1</sup> *Baker v. Griffin*, 50 Miss. 158, 163. See, also, *Harper v. Hopkins*, 34 Miss. 472.

<sup>2</sup> *Murray v. Ballou*, 1 Johns. Ch. 566.

<sup>3</sup> *Keller v. Nutz*, 5 Serg. & R. 245.

sumed to know of the registry of a will containing a devise of the land which he claims by a superior title.<sup>1</sup> It is said that a judgment debtor, who retains possession of land sold under execution against him, may be presumed to hold under the title of the purchaser at the sale. But in a case where a judgment debtor remained in possession for a long period of time, claiming that he was holding as the life tenant of a purchaser under a senior judgment, the deed to whom had never been filed for record, it was held that his possession could not be considered as constructive notice to a subsequent mortgagee, under the junior judgment of such asserted title, or of the title of the one, who, he claimed, was his lessor.<sup>2</sup> Where a subsequent purchaser has no actual knowledge of prior equities, he is not charged with constructive notice of such equities because they are expressed in the recitals of an unauthorized deed duly recorded, from the executors of an individual through whose heirs the subsequent purchaser derives his title.<sup>3</sup>

**§ 715. Record of deeds subsequent to mortgage not notice to mortgagee.**—It results from the principle we have just stated that after the registration of a mortgage, the mortgagee is not charged with notice of deeds or mortgages subsequently made by the mortgagor.<sup>4</sup> “The

<sup>1</sup> *Woods v. Farmere*, 7 Watts, 382; 32 Am. Dec. 772.

<sup>2</sup> *Cook v. Travis*, 20 N. Y. 400.

<sup>3</sup> *Blake v. Graham*, 6 Ohio St. 580; 67 Am. Dec. 360. The court said that this rule rested on the reason, “that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing, link by link, his chain of title on the record, necessarily pass under his inspection.”

<sup>4</sup> *Iglehart v. Crane*, 42 Ill. 261; *King v. McVickar*, 3 Sand. Ch. 192; *Birnie v. Main*, 29 Ark. 591; *Cooper v. Bigly*, 13 Mich. 463; *Heaton v. Prather*, 84 Ill. 330; *James v. Brown*, 11 Mich. 25; *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *George v. Wood*, 9 Allen, 80; 85 Am. Dec. 741; *Deuster v. McCamus*, 14 Wis. 307; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Straight v. Harris*, 14 Wis. 509; *Doolittle v. Cook*, 75 Ill. 354; *Westbrook v. Gleason*, 14 Hun, 245; *Van Orden v. Johnson*, 14 N. J. Eq. 376; 82 Am. Dec. 254; *Halstead v. Bank of Kentucky*, 4 Marsh. J. J. 555; *Wheelwright v. De Peyster*, 4 Edw. Ch. 232; 3 Am. Dec. 345; *Truscott v. King*, 6 Barb. 346; *Blair v. Ward*, 10 N. J. Eq. (2 Stockt. Ch.) 119; *Tal-*



effect of recording a mortgage or other conveyance is not retrospective, or its object to effect rights already vested and secured, and a mortgagee, after having his deed recorded, is not required to search the record from time to time to see whether other encumbrances have been put upon the land with which he is in nowise concerned.”<sup>1</sup> Where there are two mortgages, the court may prevent the first mortgagee, in case he has released lands primarily liable for his claim to the prejudice of the second mortgagee, whose lien extends to only part of the lands affected by the first mortgage, from enforcing his mortgage upon the land included in both mortgages, until he makes a deduction of the value of the land released from this debt. But this action will not be taken unless the first mortgagee has knowingly prejudiced the rights of the other. He is not liable to these consequences if he releases without notice, and the record is not notice for this purpose.<sup>2</sup> “The law requires every man so to deal with his own as not unnecessarily to injure another. He may sell his property to whom he pleases, without consulting his neighbor, or inquiring how it may affect his interests. And if he take a mortgage of A to-day, he may to-morrow or next week release a part or the whole of the mortgaged premises, on the request of the mortgagor, without troubling himself to inquire whether in the meantime some one has not taken a subsequent mortgage, and, if so, whether it would be agreeable to such person that he should release. It is the duty of a subsequent mortgagee, if he intends to claim any rights

*mage v. Wilgers*, 4 Edw. Ch. 239, n; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Taylor v. Maris*, 5 Rawle, 51; *Leiby v. Wolf*, 10 Ohio, 83; *Hill v. McCarter*, 27 N. J. Eq. 41; *Raynor v. Wilson*, 6 Hill, 469; *Patty v. Pease*, 8 Paige, 277; 35 Am. Dec. 683; *Kipp v. Merzelis*, 30 N. J. Eq. 99; *Meacham v. Steele*, 93 Ill. 135; *Cogswell v. Stout*, 32 N. J. Eq. 240; *Guion v. Knapp*, 6 Paige, 35; 29 Am. Dec. 741; *Brown v. Simons*, 44 N. H. 475; *Sarles v. McGee*, 1 N. Dak. 365; 26 Am. St. Rep. 633; 48 N. W. Rep. 231; *Bright v. Buckman*, 39 Fed. Rep. 243; *Johnson v. Valido Marble Co.*, 64 Vt. 337; 25 Atl. Rep. 441.

<sup>1</sup> *Birnie v. Main*, 29 Ark. 591, 595, per Harrison, J.

<sup>2</sup> *Blair v. Ward*, 19 M. J. Eq. (2 Stockt. Ch.) 119.

through the first mortgage, or that may affect the rights of the mortgagee under it, to give the holder thereof notice of his mortgage, that the first mortgagee may act with his own understanding. If he does not, and the first mortgagee does with his mortgage what it was lawful for him to do before the second mortgage was given, without knowledge of its existence, the injury is the result of the second mortgagee's negligence in not giving notice. While the law requires every man to deal with his own so as not to injure another, it imposes a greater obligation on the other to take care of his own property than on a stranger to take care of it for him. And to make it the duty of the first mortgagee to inquire before he acts, lest he may injure some one, would reverse this rule, and make it his duty to do for the second mortgagee what the latter should do for himself. To affect the conscience, therefore, of the first mortgagee—for this whole doctrine is one of equity jurisprudence, and not of positive law—it would seem that he should have actual knowledge of the second mortgage. We do not say notice from the second mortgagee is absolutely necessary to enable him to claim the rights of which we have been speaking; but we do think that the existence of the second mortgage should clearly be brought home to the knowledge of the first mortgagee, in such a way as to show an intentional disregard by him of the interests of the subsequent mortgagee.”<sup>1</sup>

**§ 716. Subsequent purchaser should notify mortgagee.** If subsequent purchasers or lienholders desire to obtain any equity which they may compel a prior mortgagee to respect, they must give him actual notice of their claims.<sup>2</sup> Hence, when a whole lot of land is covered by a prior mortgage, the fact that a builder has possession of one part of it for the erection of a building, and is actually engaged in its construction, is not sufficient to charge the

<sup>1</sup> *James v. Brown*, 11 Mich. 25, 30, per Manning, J.

<sup>2</sup> *Cheever v. Fair*, 5 Cal. 337; *McIlvain v. Mutual Assurance Co.*, 93 Pa. St. 30.

mortgagee with notice that the builder has a lien, and does not place on the mortgagee the obligation of inquiring as to the existence of the lien, or invest the builder with the equitable right to ask for a reduction of the mortgage debt in proportion to the value of other lots released from the operation of the mortgage.<sup>1</sup> But it was held, in Michigan, that where the land mortgaged was situated on one of the main streets of the village in which the mortgagee resided, and a purchaser of a part of the land had promptly placed his deed on record, and went into actual possession of the premises and made improvements to them as a place of residence, the knowledge of these facts on the part of the mortgagee was sufficient to put him upon inquiry before releasing from the operation of the lien of the mortgage other parts of the whole tract.<sup>2</sup>

§ 717. **Actual notice.**—If the deed of the purchaser is recorded, and the mortgagee is notified by letter of the sale and the name of the buyer, he cannot release any part of the land to the prejudice of such purchaser.<sup>3</sup> A mortgagee has a right to presume, when he has no express notice of anything to put him upon inquiry, that the condition of affairs is the same as when his mortgage was executed, and that the mortgagor is still the owner; and mere possession by itself alone, without the mortgagee's knowledge of who has possession, or knowledge of any facts to excite inquiry, does not amount to notice.<sup>4</sup> But if he has actual notice of a subsequent deed, a release of a part of the mortgaged premises, to the prejudice of the grantee, will have the effect of discharging his lien to the extent of the value of the land removed from the operation of the mortgage.<sup>5</sup>

§ 718. **Notice of unrecorded deed.**—If succeeding deeds contain proper recitals, a party may be charged

<sup>1</sup> *McIlvain v. Mutual Assurance Co.*, 93 Pa. St. 30.

<sup>2</sup> *Dewey v. Ingersoll*, 42 Mich. 17.

<sup>3</sup> *Hall v. Edwards*, 43 Mich. 473.

<sup>4</sup> *Cogswell v. Stout*, 32 N. J. Eq. 240.

<sup>5</sup> *Cogswell v. Stout*, *supra*. See *Gilbert v. Haire*, 43 Mich. 283.

with constructive notice of prior unrecorded deeds. But if a grantee in an unrecorded deed conveys the land described therein to a party, and the latter to another, and neither of the two deeds last executed contains any reference to the unrecorded deed, the record of these latter deeds gives no notice of the unrecorded deed.<sup>1</sup> And in this connection it may be observed that a purchaser is not charged with notice that there exists an adverse unrecorded deed of the land purchased by him, from the mere fact that before the purchase, in an interview with his grantor, he was informed by him that he was not able to make a good title, but would be in a short time.<sup>2</sup> Both parties claimed title from a common source. One claimed under a deed to A, which was first executed, but was not recorded until after the record of a deed to B, under whom the other party claimed. It was held that it was immaterial that the deed from A was recorded before the deed to B. If the latter deed had acquired priority by reason of its precedence on the record, no valid title against it could be obtained from A. It was also held to be immaterial that A's deed was recorded prior to a deed from B, or from the latter's grantee, for if the latter is protected by the recording laws, so are all claiming under him.<sup>3</sup>

<sup>1</sup> The City of Chicago v. Witt, 75 Ill. 211.

<sup>2</sup> The City of Chicago v. Witt, *supra*.

<sup>3</sup> Page v. Waring, 76 N. Y. 463. See, also, Roberts v. Bourne, 23 Me. 165; 39 Am. Dec. 614; Felton v. Pitman, 14 Ga. 536; Calder v. Chapman, 52 Pa. St. 359; 91 Am. Dec. 163; Fenno v. Sayre, 3 Ala. 458; Harris v. Arnold, 1 R. I. 125; Lightner v. Mooney, 10 Watts, 407; Cook v. Travis, 22 Barb. 338. "An open and continued possession of land by a person having an unrecorded deed, and claiming the land as his own, is not presumptive notice of the existence of such a deed, to a subsequent purchaser. If a deed could be presumed from possession, it would not be necessary to record it. Possession, though evidence of some title, is not necessarily evidence of *any particular* title, but should put the party on inquiry; and the intent of the registry act is to protect purchasers from secret or concealed conveyances, by requiring every deed to be recorded, on the peril of forfeiture of the estate": Harris v. Arnold, *supra*.

In Felton v. Pitman, *supra*, the court say: "Mr. Pitman is about to purchase lot No. 374, in Sumter county, of Allen Marshall, who informs him that he derived title from Mrs. Jane Carlisle, the only heir at law of Benjamin Carlisle, deceased, and also from the estate of said deceased.

When a person has notice of an unrecorded deed he is considered as having notice also of its contents.<sup>1</sup>

**§ 719. Unrecorded deed, and recorded purchase money mortgage.**—If a person sells a piece of land executing a deed therefor, and the grantee makes a mortgage back, the deed being unrecorded, the registration of the mortgage is not notice of the existence of the unrecorded deed.<sup>2</sup>

**§ 720. Comments.**—In such a case, the title upon the records would appear to be in the grantor, and if a third person should execute a mortgage to him, its record could not of itself alone give any notice that the mortgagor had title under a prior unrecorded deed. It is possible, however, that if it could be shown that a subsequent purchaser had actual knowledge of this mortgage, aside from the presumption of constructive notice from the fact of its registration, he might be deemed to have information of sufficient facts to put him upon inquiry, and might be charged with notice if he failed to prosecute it. But this is extremely doubtful.

**§ 721. Subsequently acquired title insuring to benefit of grantee to prejudice of purchaser.**—If a person, who has no title at the time, conveys or mortgages a piece of

How could the registration of deeds from Sullivan to Marshall, and from Marshall to Rushin, put Mr. Pitman upon inquiry as to the ownership of this land? He searches the records alphabetically to see whether the Carlises, husband or wife, his original grantors, have conveyed. He finds no deed passing out of them. What is there upon the books to direct his attention or inquiry to deeds, executed by other persons having no connection with the Carlises? We look to the index for the names of the grantor and grantee, and not to the body of the deed, to see what property they convey. Such a rule as this would devolve upon every citizen, for his safety and security, to search the books in the clerk's office almost as diligently as his Bible, to see what property was passing from hand to hand, throughout the entire community. It would be practically to convert him into that most odious of characters, a busy body into other people's matters."

<sup>1</sup> Hill v. Murray, 56 Vt. 177.

<sup>2</sup> Veazie v. Parker, 23 Me. 170; Pierce v. Taylor, 23 Me. 246.

land to another with warranty, any title he may subsequently acquire will inure to the benefit of the grantee or mortgagee, and in some States, this rule prevails by force of statute, even in the absence of an express warranty in the instrument itself. It is held that this principle applies to a case where the grantor procures title and, at the same time, conveys or mortgages the premises to another. The title thus acquired inures to the benefit of the first grantee under the deed made prior to the acquisition of title.<sup>1</sup> A person purchased a piece of land and put his son into possession, who forged a deed of the land from his father to himself and placed it upon record. Subsequently the son, for the purpose of securing a loan, executed a mortgage with covenants of warranty. Some years afterward the father made a deed to his son, and this was placed upon record. Afterward the son conveyed the land to another, who purchased it for a full consideration without notice of the mortgage. It was held by a majority of the court that the record of the mortgage was constructive notice to such subsequent purchaser, and, under the recording laws, was entitled to priority over his title.<sup>2</sup> Commissioner Earl, who spoke for the majority of the court, said: "It is a principle of law, not now open to doubt, that ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance with warranty, and afterward himself purchases and receives the title, the

<sup>1</sup> *Jarvis v. Atkins*, 25 Vt. 635; *Wark v. Willard*, 13 N. H. 389; *Tefft v. Munson*, 57 N. Y. 97; *Doyle v. Peerless etc. Co.*, 44 Barb. 239; *Pike v. Galvin*, 29 Me. 183; *Kimball v. Blaisdell*, 5 N. H. 593; 22 Am. Dec. 476; *Somes v. Skinner*, 3 Pick. 52; *Farmer's L. & T. Co. v. Maltby*, 8 Paige, 361; *Salisbury Savings Society v. Cutting*, 50 Conn. 113; *Philly v. Sanders*, 11 Ohio St. 490; 78 Am. Dec. 316; *Douglass v. Scott*, 5 Ohio, 194; *Crane v. Turner*, 67 N. Y. 437; *Christy v. Dana*, 34 Cal. 548; 42 Cal. 174; *Kirkaldie v. Larrabee*, 31 Cal. 455; 89 Am. Dec. 205; *Gotham v. Gotham*, 55 N. H. 440; *Cooke v. Watson*, 30 N. J. Eq. 345; *Lemon v. Terhune*, 40 N. J. Eq. 364; *Russ v. Alpaugh*, 118 Mass. 369; 19 Am. Rep. 464; *Knight v. Thayer*, 125 Mass. 25; *Boone v. Armstrong*, 87 Ind. 168; *McInniss v. Pickett*, 65 Miss. 354; 3 So. Rep. 660; *Kaiser v. Earhart*, 64 Miss. 492; 1 So. Rep. 635; *Bramlett v. Roberts*, 68 Miss. 325; 10 So. Rep. 56; *Edwards v. Hillier*, 70 Miss. 803; 13 So. Rep. 692.

<sup>2</sup> *Tefft v. Munson*, 57 N. Y. 97.

same will vest immediately in his grantee, who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor, in such case, being at the same time the warrantor of the title, which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed.<sup>1</sup> And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood, and privies in law; and in such case, the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. . . . Assuming it to be the rule that the record of a conveyance made by one having no title is ordinarily a nullity, and constructive notice to no one, the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage." But Commissioner Reynolds, with whom concurred Chief Commissioner Lott, dissented from these views, and said: "The forged deed was, of course, a nullity, and could not in the eye of the law have any effect by way of constructive notice or otherwise. It conveyed nothing, and was not a 'conveyance' within the meaning of the recording acts, and did not affect the title to the land 'in law or in equity.' It may be assumed, therefore, that the loan commissioners took the mortgage knowing that Martin B. Perkins had no title, it being very clear that they acquired no legal rights by being imposed upon, against anyone save Martin B. Perkins. They got no interest in the land, either

<sup>1</sup> Citing *Wark v. Willard*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 N. H. 533; 22 Am. Dec. 476; *Somes v. Skinner*, 3 Pick. 52; *The Bank of Utica v. Mesereau*, 3 Barb. Ch. 528, 567; 49 Am. Dec. 189; *Jackson v. Bull*, 1 Johns. Cas. 81, 90; *White v. Patten*, 24 Pick. 324; *Pike v. Galvin*, 29 Me. 183.



in law or equity. It is not in principle unlike the case of a forged negotiable promissory note, where a *bona fide* holder for value can have no protection. It follows, therefore, that the entry of the mortgage in the books of the loan office at the time it was made was of no legal consequence whatever, except as against the mortgagor. It was no notice under the recording acts, for it did not in the remotest degree affect the title to the land described in it. . . . It is urged that there was no necessity of making any further record of the mortgage, because the title in the mortgagees comes under the warranty by way of rebutter or estoppel. This will not do. It is sufficient to say that by virtue of the transactions under which the defendants look to enforce the lien of the mortgage, the title to the land is affected, and such a paper must be properly put on record to bind subsequent purchasers in good faith. If this be not so, it is impossible to see how a subsequent *bona fide* purchaser can have any protection, and when it is said to be impossible to record the estoppel which gave the mortgage vitality, it may be answered, that until the estoppel became operative, the mortgage was a nullity, and the record of it no notice whatever. When, however, Martin B. Perkins obtained the title to the premises, it became by some operation of law valid against him, but it was of no greater force or effect, than if he had on that day given it to the loan commissioners. It then for the first time affected the title to the land, and in order to bind subsequent purchasers in good faith must be duly recorded, and this was not done in any such way as to operate as constructive notice under the recording acts. It is not questioned but that the plaintiff is to be protected as a *bona fide* purchaser for value, unless the mortgage given in 1850, and then entered in proper order in the books of the loan office, which at the time did not affect the title to the land in any way, was constructive notice of the lien. It is well settled that a conveyance that is not duly recorded according to law, even when the actual title has passed, is not effectual as constructive no-

tice. Much less can it be, that a conveyance which does not affect the title can give any legal notice whatever. In the very best aspect of the defendant's case, the record of the mortgage was made out of the order required by law, and failed to give notice to anybody dealing with the title to the land. In this view the deed of the plaintiff was first recorded, and he is entitled to protection in his title."<sup>1</sup>

§ 722. **Comments.**—Of course, the legal principle that an after-acquired title of the grantor, when there is an express or implied covenant of warranty, inures to the benefit of the grantee, cannot be disputed. This rule is founded on the principle of estoppel, and it cannot be contended that such estoppel does not bind privies as well as the grantor himself. But it does seem that some way should be provided for giving notice of this after-acquired title by the record. The theory of our registration laws is, that the records disclose all interests and claims affecting title to real estate. It is against their policy to allow claims to be set up founded on facts or transactions of which the records give no information. And it is essential to the security of land titles and to their marketable value, that the community should know that they may deal with perfect confidence on the assumption that the title is such as the records show it to be. A person taking a chain of title, and following it down until he finds the title in a certain person, may generally act on the belief that such person is the owner of the title. But in the case we have been considering in the previous section, he cannot always safely do this. Suppose that A is the owner of a piece of land, and B has no title whatever to it, but nevertheless conveys it by deed with covenant of warranty to C, who has his deed recorded. A person searching the records would find the title in A, and if A conveyed his title to B, he would find that A's title had passed to B, and would naturally con.

<sup>1</sup> *Tefft v. Munson*, 57 N. Y. 101.

clude that B was the owner, if he found no subsequent conveyances from B. But if B had previously conveyed the land to C, with covenant of warranty as we have supposed, his title would, by the doctrine of estoppel, inure at once to the benefit of C. If B, after acquiring the title, should convey to D, the latter would obtain no title, because his grantor had none to convey, whatever he had having passed to C. There is no escape from this conclusion. Yet it must be apparent that a person who relied upon the records alone for the chain of title would be misled. It certainly is desirable that some method should be provided of having the record show all the rights of the parties. This might be partially attained in the case under consideration by giving the grantee under the prior deed a specified time after knowledge of the acquisition of title by the grantor in which to re-record his deed.

**§ 723. How far back purchaser must search.**—In ordinary practice, a person who relies upon his own examination of the records will feel perfectly satisfied with the grantor's title, if he finds that title vested in him at a particular date, and nothing occurring subsequently to affect it. Such purchaser will not generally search the records to ascertain if, anterior to the acquisition of title, the grantor had not made some transfer of it. The interesting question presents itself of how far back it is the duty of an intending purchaser to search for conveyances from his grantor. May he act on the assumption that no conveyances have been made by the grantor previously to the time that he obtained title, or is he compelled to search beyond this period? The authorities do not afford a positive and unanimous answer to this question. On one hand, the rule announced by the Supreme Court of Missouri is, that a purchaser must, at his risk, inquire into the condition of the record title of his grantor, and will be charged with constructive notice of all conveyances made by him affecting the title, which have been duly recorded. The court applied this

rule in a case where a person, having a bond for a deed, sold and assigned it to another, who, in turn, conveyed it to a third person, whom we will designate as A. The second holder of the bond, however, conveyed in trust all his right, title, and interest in the premises to secure a portion of money due to his immediate grantor before he conveyed his interests to A, the third party. This deed of trust was duly recorded prior to the purchase by A. The latter paid the amount due upon the bond to the original grantor and obtained a deed. A sale was had under the trust deed, and the premises were purchased by a person whom we will designate as B. The controversy was between A and B. B, the purchaser at the trustee's sale, tendered to A the amount paid by him to the original grantor with the accrued interest, and asked that A might be divested of title, and the same be vested in him. The court held, that, although at the time the deed of trust was made, the grantor therein had vested in himself no title, still subsequent purchasers were charged with constructive notice from the fact that it was recorded; and said of A, that if he had "searched the records as a prudent man should, he must have acquired actual knowledge of the deed and its contents, as shown by the record. If he neglected this reasonable precautionary search, the consequences of that neglect he must bear. It would be unjust to visit them upon an innocent third party."<sup>1</sup>

<sup>1</sup> *Digman v. McCollum*, 47 Mo. 372, 377. Currier, J., delivered the opinion of the court and remarked: "The deed was on record, and the defendant, according to the plaintiff's view, must be presumed to have searched the records and come to a knowledge of the contents of the deed. The defendant is sought to be affected with constructive notice from the fact that the instrument was duly recorded. The general rule on this subject undoubtedly is, that a purchaser must, at his own peril, inquire into the state of the grantor's title, since he will be affected with constructive notice of all duly recorded conveyances by his grantor affecting that title. I am aware of no exception to this rule, although it has repeatedly been decided that a purchaser is not affected with constructive notice of anything that does not lie within the course of the title with which he is dealing, or that is not in some way connected with it; or, as Judge Scott expressed it in *Crockett v. Maguire*, 10

§ 724. **Correct rule.**—On the other hand, it is held that a purchaser is not charged with constructive notice of deeds made by his grantor before he acquired title. This rule, we believe, is sustained by the weight of authority, and may be declared to be the general principle supported by the decided cases.<sup>1</sup> One having an unrecorded contract for the purchase of a tract of land executed a mortgage, which was placed on record. The mortgagor

Mo. 34, the 'registry of a deed is only evidence of notice to after-purchasers from the same grantor'; that is, from the grantor in the registered deed. In the case now before the court, Williams, the grantor in the recorded deed of trust, was the defendant's vendor, as respects the equitable title to the premises in contest. That title passed from him to the defendant in virtue of the transaction between them; that is, by the sale, receipt of the purchase money, and delivery of the bond. Had Williams passed the title by deed, he would have been the defendant's technical grantor, as well as vendor. But the form of the conveyance does not affect the substance of the transaction. Williams had an interest in the property to convey. He still held the equitable title, subject to the encumbrances, for the deed of trust had not then been foreclosed. That title he passed to and vested in the defendant. Is he not to be regarded as the grantor of that interest? As between Williams and the defendant, they were dealing with the equitable title and nothing else. As respected the recorded condition of that title, was it not as much the business of the purchaser to search the record as though he had been negotiating for the legal title? Where is the difference in principle? . . . If the defendant searched the record of deeds with common prudence and care, he must have found the deed of trust under which the plaintiff claims, and thus come to a knowledge of its contents. It is no objection to this view that Williams had vested in himself no title of record. That happens more or less frequently in regard to legal as well as equitable estates. Titles are acquired as well by adverse possession as by deed. So, a party may hold a title in fee under an unrecorded deed. If a party has in fact a title, whether of record or not, he may encumber it, and that may be shown by the record. Prudent men will make the proper search preliminary to their purchases. The law presumes that they do so, and courts, as has already been remarked, act upon that presumption. This is the undisputed doctrine in relation to legal titles, and we are furnished with no decided case, dictum, or reason, against applying the rule to equitable as well as legal titles and interests."

<sup>1</sup> *Farmers' Loan and Trust Co. v. Maltby*, 8 Paige, 361; *Losey v. Simpson*, 3 Stockt. Oh. 246; *Oalber v. Chapman*, 52 Pa. St. 359; 91 Am. Dec. 163; *Page v. Waring*, 76 N. Y. 463; *Buckingham v. Hanna*, 2 Ohio St. 551; *Doswell v. Buchanan*, 3 Leigh, 365; 23 Am. Dec. 280; *Hetzel v. Barber*, 69 N. Y. 1.

subsequently acquired the title by deed from his vendor, and then sold the premises to another, who had his deed duly recorded. It was held, that the registration of the mortgage having occurred before the records disclosed title in the mortgagor, was not constructive notice to the second grantee, who purchased the property after the title had been transferred to his grantor.<sup>1</sup>

<sup>1</sup> Farmers' Loan and Trust Co. v. Maltby, 8 Paige, N. Y. 361.

## CHAPTER XXIII.

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## PART I.

### THE GENERAL RULES OF NOTICE.

§ 725. **In general.**—It is a well-settled rule, both in England and in this country, that subsequent purchasers who have notice of a prior unrecorded deed, acquire their rights in subordination to it. They are affected by their knowledge of its existence in the same mode, and to the same extent, as if the deed had, prior to their purchase, been properly recorded.<sup>1</sup> Courts have frequently doubted

<sup>1</sup> *Le Neve v. Le Neve*, Amb. 436; *Creland v. Potter*, Law R. 10 Ch. 8; *Chadwick v. Turner*, Law R. 1 Ch. 310; *Ford v. White*, 16 Beav. 120; *Davis v. Earl of Strathmore*, 16 Ves. 419; *Rolland v. Hart*, Law R. 6 Ch. 678; *Benham v. Keane*, 3 De Gex, F. & J. 318; *Finch v. Beal*, 68 Ga. 594; *Greaves v. Tofield*, Law R. 14 Ch. D. 563; *Dunham v. Dey*, 15 Johns. 555; 8 Am. Dec. 282; *Cabeen v. Breckenridge*, 48 Ill. 91; *Brinkman v. Jones*, 44 Wis. 498; *Britton's Appeal*, 9 Wright, 172; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306; *Williamson v. Brown*, 15 N. Y. 354; *Maupin v. Emmons*, 47 Mo. 304; *White v. Foster*, 102 U. S. 375. And see *Wyatt v. Barwell*, 19 Ves. 435; *Doe v. Allsop*, 5 Barn. & Ald. 142; *Hine v. Dodd*, 3 Atk. 275; *Janvrin v. Janvrin*, 60 N. H. 169; *Jolland v. Stainbridge*, 3 Ves. 478; *Brown v. Volkenning*, 64 N. Y. 76; *Dey v. Dunham*, 2 Johns. Ch. 182; *Bonner v. Stephens*, 60 Tex. 616; *Lawton v. Gordon*, 37 Cal. 202; *Jackson v. Van Valkenburg*, 8 Cowen, 260; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306; *Bergeron v. Richardott*, 55 Wis. 129; *Grimstone v. Carter*, 3 Paige, 421; 24 Am. Dec. 230; *Fleming v. Burgin*, 2 Ired. Eq. 584; *Crassen v. Swoveland*, 22 Ind. 427; *Wilson v. Hunter*, 30 Ind. 466; *Ellis v. Horrman*, 90 N. Y. 466; *Norcross v. Widgery*, 2 Mass. 505; *McMechan v. Griffing*, 3 Pick. 149; 15 Am. Dec. 198; *Truesdale v. Ford*, 37 Ill. 210; *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381; *General Life Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517; 69 Am. Dec. 174; *Lamb v. Pierce*, 113 Mass. 72; *Clark v. Plumstead*, 11 Ill. App. 57; *Allen v. Holding*, 29 Ga. 485; *Wyatt v. Elam*, 19 Ga. 335; *Poulet v. Johnson*, 25 Ga. 403; *Allen v. Holden*, 32 Ga. 418; *Lee v. Cato*, 27 Ga. 637; 73 Am.

the wisdom of allowing the question of notice other than that furnished by the record to be litigated. The statutes providing for a system of registration would undoubtedly

Dec. 746; *Brown v. Wells*, 44 Ga. 573; *Downs v. Yonge*, 17 Ga. 295; *Virgin v. Wingfield*, 54 Ga. 451; *Seabrook v. Brady*, 47 Ga. 650; *Bryant v. Booze*, 55 Ga. 438; *Williams v. Adams*, 43 Ga. 407; *Wimbish v. Montgomery Mut. Building & Loan Assn.*, 69 Ala. 575; *Helms v. May*, 29 Ga. 121; *Doe v. Roe*, 25 Ga. 55; *Reynolds v. Ruckman*, 35 Mich. 80; *Hommel v. Devinney*, 39 Mich. 522; *Fitzhugh v. Barnard*, 12 Mich. 105; *Munroe v. Eastman*, 31 Mich. 283; *Baker v. Mather*, 25 Mich. 51; *Hosley v. Holmes*, 27 Mich. 416; *Shotwell v. Harrison*, 30 Mich. 179; *Cain v. Cox*, 23 W. Va. 594; *Stetson v. Cook*, 39 Mich. 750; *Waldo v. Richmond*, 40 Mich. 380; *Case v. Erwin*, 18 Mich. 434; *Barnard v. Campau*, 29 Mich. 162; *Sigourney v. Munn*, 7 Conn. 324; *Wheaton v. Dyer*, 15 Conn. 307; *Bank of New Milford v. New Milford*, 36 Conn. 94; *Blatchley v. Osborn*, 33 Conn. 228; *Clark v. Fuller*, 39 Conn. 238; *Bush v. Golden*, 17 Conn. 594; *Hamilton v. Nutt*, 34 Conn. 501; *Kirkwood v. Koester*, 11 Kan. 471; *Jones v. Lapham*, 15 Kan. 540; *Setter v. Alvey*, 15 Kan. 157; *Greer v. Higgins*, 20 Conn. 420; *Johnson v. Clark*, 18 Conn. 157; *Lyons v. Bodenhamer*, 7 Conn. 455; *School District v. Taylor*, 19 Conn. 287; *Dearing v. Watkins*, 16 Ala. 20; *Boyd v. Beck*, 29 Ala. 703; *Lambert v. Newman*, 56 Ala. 623; *Newsome v. Collins*, 43 Ala. 656; *Wyatt v. Stewart*, 34 Ala. 716; *Wallis v. Rhea*, 10 Ala. 451; *Corbett v. Clenny*, 52 Ala. 480; *Burch v. Carter*, 44 Ala. 115; *De Vandal v. Malone's Executors*, 25 Ala. 272; *Smith's Heirs v. Branch Bank*, 21 Ala. 125; *Dudley v. Witter*, 46 Ala. 664; *Ponder v. Scott*, 44 Ala. 241; *Johnson v. Thweatt*, 18 Ala. 741; *Campbell v. Roach*, 45 Conn. 667; *Hoole v. Attorney General*, 22 Ala. 190; *Lindsay v. Veasey*, 62 Ala. 421; *Bernstein v. Humes*, 60 Ala. 582; 31 Am. Rep. 52; *Chapman v. Holding*, 60 Ala. 522; *Fair v. Stevenot*, 29 Cal. 486; *Galland v. Jackman*, 26 Cal. 79; 85 Am. Dec. 172; *Moss v. Atkinson*, 44 Cal. 3; *Jones v. Marks*, 47 Cal. 242; *O'Rourke v. O'Connor*, 39 Cal. 442; *Smith v. Yule*, 31 Cal. 180; 89 Am. Dec. 167; *Thompson v. Pioche*, 44 Cal. 508; *Ricks v. Doe*, 2 Blackf. 346; *Paul v. Connersville etc. R. R.*, 51 Ind. 527, 530; *Wiseman v. Hutchinson*, 20 Ind. 40; *Croskey v. Chapman*, 26 Ind. 333; *Brose v. Doe*, 2 Ind. 666; *Kirkpatrick v. Caldwell's Administrators*, 32 Ind. 299; *Holman v. Patterson's Heirs*, 29 Ark. 357; *Stidham v. Mathews*, 20 Ark. 650, 659; *Follweiler v. Lutz*, 102 Pa. St. 585; *Haskell v. The State*, 31 Ark. 91; *Redden v. Miller*, 95 Ill. 336; *Erickson v. Rafferty*, 79 Ill. 209; *Frye v. Partridge*, 82 Ill. 267; *Shepardson v. Stevens*, 71 Ill. 646; *Ogden v. Haven*, 24 Ill. 57; *Chicago etc. R. R. v. Kennedy*, 70 Ill. 350; *Chicago v. Witt*, 75 Ill. 211; *Watson v. Phelps*, 40 Iowa, 482; *Jones v. Bamford*, 21 Iowa, 217; *Wilson v. Miller*, 16 Iowa, 111; *Smith v. Dunton*, 42 Iowa, 48; *Blanchard v. Ware*, 43 Iowa, 530; *Johnston v. Gwathmey*, 4 Litt. 317; 14 Am. Dec. 135; *Hopkins v. Garrard*, 7 Mon. B. 312; *Mueller v. Engeln*, 12 Bush, 441; *Honore v. Bakewell*, 6 Mon. B. 67; 43 Am. Dec. 147; *Thornton v. Knox*, 6 Mon. B. 74; *Hardin v. Harrington*, 11 Bush, 367; *Forepaugh v. Appold*, 17 Mon. B. 631; *Vanmeter v. McFaddin*, 8 Mon. B. 442; *Roberts v. Grace*, 16 Minn. 126;

become more effective if all conveyances should take effect in the order in which they are filed for record, aside from any inquiry as to other notice. But the manifest

*Doughaday v. Paine*, 6 Minn. 443; *Ross v. Worthington*, 11 Minn. 438; 88 Am. Dec. 95; *Coy v. Coy*, 15 Minn. 119; *Rich v. Roberts*, 48 Me. 548; *Webster v. Maddox*, 6 Me. 256; *Hull v. Noble*, 40 Me. 459, 430; *Spofford v. Weston*, 29 Me. 140; *Butler v. Stevens*, 26 Me. 484; *Kent v. Plummer*, 7 Me. 464; *Goodwin v. Cloudman*, 43 Me. 577; *Merrill v. Ireland*, 40 Me. 569; *Porter v. Sevey*, 43 Me. 519; *Hanley v. Morse*, 32 Me. 237; *Smith v. Lambeths*, 15 La. Ann. 566; *Moore v. Jourdan*, 14 La. Ann. 414; *Swan v. Moore*, 14 La. Ann. 833; *Bell v. Haw*, 8 Martin, N. S., 243; *Acer v. Westcott*, 46 N. Y. 884; 7 Am. Rep. 355; *Page v. Waring*, 76 N. Y. 463; *Gibert v. Peteler*, 38 N. Y. 165; 97 Am. Dec. 785; *Griffith v. Griffith*, 1 Hoff. Ch. 135; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 56 Am. Dec. 478; *Murrell v. Watson*, 1 Tenn. Ch. 342; *Tharpe v. Dunlap*, 4 Heisk. 674, 686; *Mara v. Pierce*, 9 Gray, 306; *Pingree v. Coffin*, 12 Gray, 288; *Sibley v. Leffingwell*, 8 Allen, 584; *Parker v. Osgood*, 3 Allen, 487; *George v. Kent*, 7 Allen, 16; *Dooley v. Walcott*, 4 Allen, 406; *Connihan v. Thompson*, 111 Mass. 270; *Curtis v. Mundy*, 3 Met. 405; *Buttrick v. Holden*, 13 Met. 355; *Hennessey v. Andrews*, 6 Cush. 170; *Lawrence v. Stratton*, 6 Cush. 163; *Baynard v. Norris*, 5 Gill, 483; 46 Am. Dec. 647; *Green v. Early*, 39 Md. 223; *Johns v. Scott*, 5 Md. 81; *Winchester v. Baltimore etc. R. R.*, 4 Md. 231; *Price v. McDonald*, 1 Md. 403; 54 Am. Dec. 657; *Wasson v. Connor*, 54 Miss. 351; *Buck v. Paine*, 50 Miss. 648; *Allen v. Poole*, 54 Miss. 323; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Deason v. Taylor*, 53 Miss. 697; *Avent v. McCorkle*, 45 Miss. 221; *Parker v. Foy*, 43 Miss. 260; 55 Am. Rep. 484; *Loughridge v. Bowland*, 52 Miss. 546, 553; *Gilson v. Boston*, 11 Nev. 413; *Grellett v. Heilshorn*, 4 Nev. 526; *Major v. Bukley*, 51 Mo. 227, 231; *Maupin v. Emmons*, 47 Mo. 304; *Digman v. McCollum*, 47 Mo. 372, 375; *Ridgway v. Holliday*, 59 Mo. 444; *Fellows v. Wise*, 55 Mo. 413; *Eck v. Hatcher*, 58 Mo. 235; *Rhodes v. Outcalt*, 48 Mo. 367; *Speck v. Riffin*, 40 Mo. 405; *Muldrow v. Robinson*, 58 Mo. 331; *Masterson v. West End etc. R. R.*, 5 Mo. App. 64; *Roberts v. Moseley*, 64 Mo. 507; *Norton v. Meader*, 8 Saw. 603; *Hardy v. Harbin*, 4 Saw. 536; *Helms v. Chadbourne*, 45 Wis. 60, 73; *Hoppin v. Doty*, 25 Wis. 573, 591; *Hoxie v. Price*, 31 Wis. 82; *Gilbert v. Jess*, 31 Wis. 110; *Fallass v. Pierce*, 30 Wis. 443; *Brinkman v. Jones*, 44 Wis. 498, 519; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436; *Willis v. Gay*, 48 Tex. 463; 26 Am. Rep. 328; *Rodgers v. Burchard*, 34 Tex. 441; 7 Am. Rep. 283; *Littleton v. Giddings*, 47 Tex. 109; *Allen v. Root*, 39 Tex. 589; *Stafford v. Ballou*, 17 Vt. 329; *Brackett v. Wait*, 6 Vt. 411; *Blaisdell v. Stevens*, 16 Vt. 179; *Corliss v. Corliss*, 8 Vt. 373; *Oox v. Cox*, 5 W. Va. 335; *Martin v. Sale*, 1 Bail. Eq. 1, 24; *Wallace v. Craps*, 3 Strob. 266; *Cabiness v. Mahon*, 2 McCord, 273; *City Council v. Page*, 1 Spear Eq. 159, 212; *Vest v. Michie*, 31 Gratt. 149; 31 Am. Rep. 722; *Mundy v. Vawter*, 3 Gratt. 518; *Newman v. Chapman*, 2 Rand. 93; 14 Am. Dec. 766; *Wood v. Krebbs*, 30 Gratt. 708; *Long v. Weller's Executors*, 29 Gratt. 347; *Doswell v. Buchanan's Executors*, 3

injustice of allowing a subsequent purchaser, with full knowledge of another's rights, to gain a priority over him through the latter's negligence to record his deed, induced the courts, at an early day, to ingraft the equitable rule upon the law of registration, that such purchaser should not take advantage of his own fraud. He was viewed as a purchaser in bad faith, and his rights accordingly were considered as inferior to those of the prior purchaser. It perhaps would be useless to the reader to enter into a long history of the growth of the doctrine of notice, and it will be sufficient to say that it generally prevails. But North Carolina and Ohio are exceptions, and, in those States, the general rule of binding a subsequent purchaser or mortgagee with notice does not apply.<sup>1</sup> If a person has a bond for a deed, and has given notes for the purchase money, a purchaser who knows that one of the notes is unpaid, although he may take a deed from the original vendor as well as from the vendee, cannot protect himself against the note held by one who took it before the purchase.<sup>2</sup>

Leigh, 365; 23 Am. Dec. 280; McClure v. Thistle, 2 Gratt. 182; Stannis v. Nicholson, 2 Or. 332; Carter v. City of Portland, 4 Or. 339, 350; Colby v. Kenniston, 4 N. H. 262; Warner v. Swett, 31 N. H. 332; Bell v. Twilight, 22 N. H. 500; Rogers v. Jones, 8 N. H. 264; Hoit v. Russell, 56 N. H. 559; Brown v. Manter, 22 N. H. 468; Patten v. Moore, 32 N. H. 382; Harris v. Arnold, 1 R. I. 125; Tillinghast v. Champlin, 4 R. I. 173, 215; 67 Am. Dec. 510; McKenzie v. Perrill, 15 Ohio St. 162; Morris v. Daniels, 35 Ohio St. 406; Lahr's Appeal, 90 Pa. St. 507; Smith's Appeal, 11 Wright, 128; Speer v. Evans, 11 Wright, 141; Britton's Appeal, 9 Wright, 172; Butcher v. Yocum, 61 Pa. St. 168; 100 Am. Dec. 625; Parke v. Neeley, 90 Pa. St. 52; Nice's Appeal, 54 Pa. St. 200; Maul v. Rider, 59 Pa. St. 167; Cordova v. Hood, 17 Wall. 1; Brush v. Ware, 15 Peters, 93; Holmes v. Stout, 2 Stockt. Ch. 419; Smith v. Vreeland, 16 N. J. Eq. 199; Van Keuren v. Central R. R., 38 N. J. L. 165; Hoy v. Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Smallwood v. Lewin, 2 McCart. 60; Raritan Water Co. v. Veghte, 21 N. J. Eq. 463; Van Doren v. Robinson, 16 N. J. Eq. 256.

<sup>1</sup> Fleming v. Burgin, 2 Ired. Eq. 584; Robinson v. Willoughby, 70 N. O. 358; Legget v. Bullock, Busb. 283; Bercaw v. Cockerill, 20 Ohio St. 163; Stansell v. Roberts, 13 Ohio, 148; 42 Am. Dec. 193; Bloom v. Noggle, 4 Ohio St. 45; Mayham v. Coombs, 14 Ohio, 428.

<sup>2</sup> Lytle v. Turner, 12 Lea (Tenn.), 641.

· § 726. **Forged deeds.**—As forged deeds cannot affect the title to land, and, therefore, are not entitled to record, the provision of the statute that deeds affecting the title to land shall be void as against subsequent purchasers and creditors without notice, if not recorded has no application to deeds which are forged.<sup>1</sup> Where a person signs a deed under the belief that he is signing a duplicate copy of a lease, never intending to sign a deed, the deed is a forgery, and no title passes thereby.<sup>2</sup> The fact that a deed has been placed on record does not afford notice of any fraud that may have occurred in its execution.<sup>3</sup>

§ 727. **Notice and knowledge.** — Though sometimes the terms “notice” and “knowledge” are used indiscriminately and interchangeably, there is a manifest distinction between them. A person may have notice of a thing without having any actual knowledge of it. If a person has sufficient information to put him upon inquiry, and he fails to prosecute that inquiry, and hence does not learn the true state of the title through his own negligence, or a desire not to learn it, he has *notice* of all he might have learned, had he prosecuted that inquiry. But he has not *knowledge* of such facts because he does not actually *know* them, but the law presumes that he does know them from the notice he has received. Knowledge means the actual acquaintance with a fact. Notice means information about a fact, which information, in its legal effect, is equivalent to knowledge of the fact, and to which the law attaches the same consequences as it would to knowledge. Notice has been defined as “Information given of some act done, or the interpellation by which some act is required to be done.”<sup>4</sup> Mr. Pomeroy suggests

<sup>1</sup> *Pry v. Pry*, 109 Ill. 466.

<sup>2</sup> *McGinn v. Tobey*, 62 Mich. 252; 4 Am. St. Rep. 848.

<sup>3</sup> *Martin v. Smith*, 1 Dill. 98; 4 Nat. Bank Reg. 287; *Godbold v. Lambert*, 8 Rich. Eq. 155; 70 Am. Dec. 192. See, also, as to the effect of forged deeds, § 240, *ante*, and *Haight v. Vallet*, 89 Cal. 245; 23 Am. St. Rep. 465; *Meley v. Collins*, 41 Cal. 663; 10 Am. Rep. 279.

<sup>4</sup> *Bouv. Law Dict.*, tit. Notice.

as an acceptable definition, "Information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge," and adds: "It should be most carefully observed that the notice thus defined is not knowledge, nor does it assume that knowledge necessarily results. On the other hand, the information which constitutes the notice may be so full and minute as to produce complete knowledge."<sup>1</sup>

§ 728. **Kinds of notice.**—It is difficult to divide notice into classifications to which objections cannot be found. Notice, however, may be classified as being of three kinds, actual, implied, and constructive. Under this classification actual notice signifies personal knowledge.<sup>2</sup> Implied notice is such as the law implies from the relations existing between the parties, as principal and agent, where notice to the principal is implied from notice to his agent.<sup>3</sup> Constructive notice is that which the law attributes to a person of things which he knows, or ought to know, or which, by using ordinary diligence, he might know.<sup>4</sup>

<sup>1</sup> 2 Pomeroy's Eq. Jur., § 594.

<sup>2</sup> Story's Eq. Jur., § 399; Rogers v. Jones, 8 N. H. 264; Lamb v. Pierce, 113 Mass. 72; Baltimore v. Williams, 6 Md. 235; Williamson v. Brown, 15 N. Y. 354; Crassen v. Swoveland, 22 Ind. 427. And see, also, Smith v. Smith, 2 Crompt. & M. 231; Michigan Mut. L. Ins. Co. v. Conant, 40 Mich. 530; North Brit. Ins. Co. v. Hallett, 7 Jur., N. S., 1263; Vest v. Michie, 31 Gratt. 149; 31 Am. Rep. 722.

<sup>3</sup> See Josephthal v. Heyman, 2 Abb. N. C. 22; Hovey v. Blanchard, 13 N. H. 145; Fuller v. Bennett, 2 Hare, 394; Walker v. Schreiber, 47 Iowa, 529; Williamson v. Brown, 15 N. Y. 354; Bank of United States v. Davis, 2 Hill, 451.

<sup>4</sup> See Weilder v. Farmers' Bank of Lancaster, 11 Serg. & R. 134; Hewitt v. Loosemore, 9 Hare, 449; Plumb v. Fluitt, 2 Anstr. 432; Kennedy v. Green, 3 Mylne & K. 699; Griffith v. Griffith, Hoff. Ch. 153.



§ 729. **Rumors.**—Rumors of a vague and uncertain character not emanating from some person interested in the property will not affect a purchaser with notice of conflicting claims to the land.<sup>1</sup> “The general doctrine is, that whatever puts a party on inquiry, amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. Notice of a deed is notice of its contents; and notice to an agent is notice to his principal. But notice of a rumor of a conveyance or encumbrance seems not to be considered as either actual or implied notice. Indeed, to set on foot an inquiry into the foundation of mere rumors would, in most cases, be a vain and impracticable pursuit. *Lex neminem cogit ad vana seu impossibilia.*”<sup>2</sup> The fact that a purchaser applies to a stranger for information as to the value of the land, and the latter, in the course of conversation which resulted from the inquiries made relative to the expediency of making the purchase at the price named, informs the purchaser that he does not know that there is any equitable title to the land, but heard a person say that he intended to prosecute a claim further, and thought he should get the land, is not sufficient to charge the purchaser with notice. This information is nothing but mere rumor.<sup>3</sup> The notice must be so clear that the purchaser cannot take and hold the property without fraud.<sup>4</sup>

<sup>1</sup> *Hall v. Livingston*, 3 Del. Ch. 348; *Butler v. Stevens*, 26 Me. 484; *Jolland v. Stainbridge*, 3 Ves. 478; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Parkhurst v. Hosford* (U. S. Cir. Ct. Or.), 4 West C. Rep. 311; *Jacques v. Weeks*, 7 Watts, 261; *Woodworth v. Paige*, 5 Ohio St. 70; *Shepard v. Shepard*, 36 Mich. 173; *Wilson v. McCullough*, 23 Pa. St. 440; 62 Am. Dec. 347; *Doyle v. Teas*, 4 Scam. 202; *Lamont v. Stimson*, 5 Wis. 443.

<sup>2</sup> *Jacques v. Weeks*, 7 Watts, 261, 267, per Sergeant, J.

<sup>3</sup> *Lamont v. Stimson*, 5 Wis. 443.

<sup>4</sup> *Hall v. Livingston*, 3 Del. Ch. 348. In this case, where a grantee held under an absolute deed, it was held that to affect a *bona fide* purchaser from him with knowledge of a secret trust, that it requires a more definite notice than a remark by a party in interest “he understood

§ 730. Same subject continued — Illustrations. — A purchaser is not charged with notice of the existence of an adverse unrecorded deed to a piece of land by the mere fact that he, sometime before his purchase, had an interview with his grantor, who told him that he was not able at that time to make a good title, but in a brief time would be.<sup>1</sup> “While it is difficult to lay down a general rule as to what facts would, in every case, be sufficient to charge a party with notice or put him upon inquiry, yet it is safe to say, that the information received ought to be of that character that a prudent person, by the exercise of reasonable and ordinary diligence, could, upon inquiry and investigation, arrive at the fact that a prior conveyance had been made.”<sup>2</sup> Speaking of the statute of Pennsylvania, Sharswood, J., says: “We are bound to apply to the interpretation of this statute that principle in regard to constructive notice which has been so long and well settled—that whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. Even a general rumor of a conveyance would not have been enough to have made it the duty of the plaintiff to search the record. Notice of such a rumor is not considered as either actual or implied notice. Indeed, to set on foot an inquiry into the foundation of mere rumors, would in most cases be a vain and impracticable pursuit. There must be some act, some declaration from an authentic source—which a person would be careless if he disregarded—which is necessary to put a party on inquiry, and

the grantee had taken the land for seven years to pay off the grantor's debts,” and a question “if he knew whose land he was trading for.” See, also, *Shepard v. Shepard*, 36 Mich. 173; *Wailes v. Cooper*, 24 Miss. 208; *Hawley v. Bullock*, 29 Tex. 222; *Martel v. Somers*, 26 Tex. 551; *Wethered v. Boon*, 17 Tex. 143; *Bugbee's Appeal*, 110 Pa. St. 331; *Lambert v. Newman*, 56 Ala. 623; *Ratteree v. Conley*, 74 Ga. 153.

<sup>1</sup> *The City of Chicago v. Witt*, 75 Ill. 211.

<sup>2</sup> *The City of Chicago v. Witt*, *supra*, per Mr. Justice Craig.

call for the exercise of reasonable diligence.”<sup>1</sup> When an absolute deed contains a recital that the purchase money has been paid, the grantor, when seeking to enforce as against a sub-purchaser for a valuable consideration, a lien on the land for the unpaid purchase money, has the burden of proving that such sub-purchaser had notice. And the positive testimony of the sub-purchaser himself denying notice, cannot be overcome by proof of conversations or declarations, repeated after an interval of fourteen or fifteen years, and not appearing to have been connected with any circumstances apt to impress them on the memory.<sup>2</sup>

§ 731. **Partnership property.**—If, under separate deeds of different dates and from different grantors, two persons hold undivided interests in the same piece of land, a party who deals in good faith with one of them with respect to his interest, is not charged with notice of the character of the property as partnership property from the knowledge merely that the owners are partners, and use the premises for the purposes of the partnership, where the records contain nothing indicating a partnership holding. “The record ought generally to be the guide on which parties may safely rely in dealing with the titles which appear there,” said Mr. Chief Justice Cooley, “and they should not be held chargeable with notice of equities controlling the title on facts which are ambiguous. Real estate held by partners may or may not be partnership property, but usually it is not so unless partnership assets have been used to purchase it, or unless it was put in originally as a part of the joint estate.

<sup>1</sup> *Maul v. Rider*, 59 Pa. St. 167, 171.

<sup>2</sup> *Lambert v. Newman*, 56 Ala. 623. See, also, as to the insufficiency of mere rumor to charge a purchaser with notice, *Loughridge v. Bowland*, 52 Miss. 546; *Miller v. Cresson*, 5 Watts & S. 284; *Butler v. Stevens*, 26 Me. 484; *Parker v. Foy*, 43 Miss. 260; 55 Am. Rep. 484; *Wailes v. Cooper*, 24 Miss. 208; *Epley v. Witherow*, 7 Watts, 163; *Hood v. Fahnestock*, 1 Barr. 470; 44 Am. Dec. 147; *Wilson v. McCullough*, 23 Pa. St. 440; 62 Am. Dec. 347; *Churcher v. Guernsey*, 3 Wright, 84.

But generally the fact that two or more persons make use of property in which their interests are apparently several, for partnership purposes, is very far from indicating an understanding that others would be bound to take notice. The several interests still remain several, and each may deal with his own as he will, and any private arrangement that would change this could not bind third parties who had acted in ignorance of it."<sup>1</sup> But where the lands are bought by the firm, and title taken in the firm name, a purchaser from one of the partners is chargeable with notice of the rights of the others.<sup>2</sup>

**§ 731 a. Information imparted to purchaser that title is in one partner.**—Likewise if the title stands on record in the names of two persons, and the purchaser is informed prior to the completion of the purchase that a claim is made to the whole of the land by one of such persons or his grantee, the title is taken subject to this claim, and may be defeated by showing that the land had been acquired by the owners of record as partners, and on a settlement of their partnership affairs it had been awarded to one of them.<sup>3</sup> On the same principle, a purchaser of land may be charged with notice of the existence of a vendor's lien on land if he knows, at the time of his purchase, that a part of the consideration still remained unpaid. Information of this character will impose upon him the duty of inquiring, and he will be charged, in accordance with the rules of notice, with what he might with reasonable diligence have ascertained.<sup>4</sup>

**§ 732. Information must be from credible source.** To bind a subsequent purchaser, the notice must come from some person interested in the property,<sup>5</sup> or from

<sup>1</sup> Reynolds v. Ruckman, 35 Mich. 80, 81.

<sup>2</sup> Brewer v. Browne, 68 Ala. 210.

<sup>3</sup> Murrell v. Mandelbaum, 85 Tex. 22; 34 Am. St. Rep. 777.

<sup>4</sup> Woodall v. Kelly, 85 Ala. 368; 7 Am. St. Rep. 57.

<sup>5</sup> Van Duyne v. Vreeland, 12 N. J. Eq. 142; Peebles v. Reading, 8 Serg. & R. 484; Rogers v. Hoskins, 14 Ga. 166; Lamont v. Stimson, 5

some source entitled to credit.<sup>1</sup> Thus, where a widow had the legal title to a piece of real estate, and a party intending to purchase was informed by the grandfather of the minor children of the widow that the equitable title had been in the deceased husband, and was then in his heirs, it was held that the grandfather was a proper person to give notice, and that the notice so communicated would affect such party if he subsequently purchased.<sup>2</sup> So a person is bound by notice derived from an uncle of a female in a state of idiocy.<sup>3</sup> "It is exceedingly difficult," says Putman, J., "if not impossible, to define beforehand what information shall or shall not be sufficient. But if it were given by those persons who (as in the case at bar) knew the party, and much of his transactions, and who spake not vaguely, especially if the party himself, who was to be affected by the notice, was so well satisfied of its truth as again and again to state or acknowledge the fact, it must be sufficient. No honest man after such notice could undertake, or, if he did, should be permitted, to acquire title to the land, which from information given on certain knowledge he believed had been conveyed. We think the notice should be so express and satisfactory to the party, as that it would be a fraud in him subsequently to purchase, attach, or levy upon the land, to the prejudice of the first grantee."<sup>4</sup>

**§ 733. Inadequacy of price.**—The price for which the land may be offered for sale may be so small that a pur-

Wis. 443; *Barnhart v. Greenshields*, 9 Moore P. C. C. 18, 36; *Natal Land Co. v. Good*, 2 Law R. P. C. 121; *Parkhurst v. Hosford*, 21 Fed. Rep. 827.

<sup>1</sup> *Curtis v. Mundy*, 3 Met. 405; *Mulliken v. Graham*, 72 Pa. St. 484.

<sup>2</sup> *Butcher v. Yocum*, 61 Pa. St. 168; 100 Am. Dec. 625.

<sup>3</sup> *Ripple v. Ripple*, 1 Rawle, 386. Said Gibbon, C. J: "Now, although a purchaser may disregard rumors set afloat by those who have no right to intermeddle, he is bound to attend to the admonitions of a party in interest. Here the daughters, although actually charged to the township, had an interest of their own, from attending to which they were disabled by idiocy; and surely one so near in blood as an uncle might lawfully interpose for their protection."

<sup>4</sup> In *Curtis v. Mundy*, 3 Met. 405, 407.

chaser must know that it is intended to sacrifice somebody's rights, and he may accordingly be held to be put upon the strictest inquiry. "It is not necessary, in order to charge a purchaser with bad faith, that he should have definite knowledge or notice of the exact character and condition of the right which he attempts to defeat. If the circumstances are such as to inform him loudly that some wrong is about to be perpetrated, he cannot blindly shut his eyes, and then come into court in the character of a *bona fide* purchaser."<sup>1</sup> The circumstances that one knowing that a parcel of land was worth between two thousand and three thousand dollars, purchased it for one hundred dollars, and knowing also that although the title of his grantor was acquired several years previously, the original owner still continued to reside upon the land, are sufficient to put such purchaser upon the strictest inquiry as to the rights of other parties.<sup>2</sup> Still, as it is unnecessary to set out the full price paid for the land, it does not follow because a price less than the actual value of the land is stated in the deed as the consideration, that this is, of itself, a suspicious circumstance requiring a purchaser to take notice of it.<sup>3</sup>

§ 734. **Statement from holder of adverse title.**—If a person about to purchase a piece of property from one assuming to act as owner is informed by a third party that the latter possesses, or claims to possess, some adverse title or interest in the property, this statement is sufficient to affect such intending purchaser with notice. Thus, if A has an unrecorded deed for certain land, and B hears A say that he has title to the land, B has sufficient notice of A's title to put him on further inquiry, and, if B afterward purchases the land from another without making such inquiry, he is held to have purchased with no-

<sup>1</sup> *Hoppin v. Doty*, 25 Wis. 573, 591, per Paine, J.; *Peabody v. Finton*, 3 Barb. Ch. 451; *Eck v. Hatcher*, 58 Mo. 235. See, also, *Hoyt v. Hoyt*, 8 Bosw. 511; *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510.

<sup>2</sup> *Hoppin v. Doty*, 25 Wis. 573. But see *Beadles v. Miller*, 9 Bush, 405.

<sup>3</sup> *Stewart's Appeal*, 98 Pa. St. 377.

tice of A's title.<sup>1</sup> If there is an equitable encumbrance upon a piece of land, and the owner sells it, and informs the purchaser that no such encumbrance exists, yet, if the purchaser, at the time of making the purchase, had knowledge of the facts by which the equitable encumbrance was created, he takes the land subject to the charge, notwithstanding that he has paid all that the land was worth, and had searched the record title, and found it clear, and took his deed in the belief that in neither law nor equity could such an encumbrance be enforced.<sup>2</sup> The fact that a party has notice of an owner's intention to execute a deed is not sufficient to show that he has notice of the contents of the deed as executed.<sup>3</sup> Land was owned in common by three parties, who may be designated as A, B, and C. A portion of the land was charged as against them with an equitable encumbrance, which did not appear of record. D purchased without notice, in good faith, and for full value, the undivided interest of A. Subsequently B conveyed his undivided interest to E, who purchased for full value, but with notice of the encumbrance. An amicable and equal partition of the land was afterward made between C, D, and E, D being still ignorant of the encumbrance. The part assigned to E, under the exchange of deeds, included the whole of the portion that was encumbered. This portion was estimated at its full value, and no allowance was made for the encumbrance. A bill in equity was brought against E for the purpose of establishing the encumbrance, and it was held that he could not avail himself of the want of notice on the part of D, to afford protection to the title to the part which he then owned in severalty.<sup>4</sup>

<sup>1</sup> *Bartlett v. Glasscock*, 4 Mo. 62.

<sup>2</sup> *Blatchley v. Osborn*, 33 Conn. 226.

<sup>3</sup> *Ponder v. Scott*, 44 Ala. 241.

<sup>4</sup> *Blatchley v. Osborn*, 33 Conn. 226. See, also, *Epley v. Witherow*, 7 Watts, 163; *Barnes v. McClinton*, 3 Pen. & W. 67; 23 Am. Dec. 62; *Nelson v. Sims*, 23 Miss. 383; 57 Am. Dec. 144; *Jacques v. Weeks*, 7 Watts, 261; *Russell v. Petree*, 10 Mon. B. 184; *Hudson v. Warner*, 2 Har. & G. 415; *Price v. McDonald*, 1 Md. 403; 54 Am. Dec. 657.



§ 735. **Information given by recorder.**—If the recorder tells a person who is about to purchase property that the seller has already given a deed to another person which had been deposited for record, but had been withdrawn before it was actually recorded, this information is sufficient to put such purchaser upon inquiry. "The rules in respect to notice to purchasers," said Rhodes, J., "of adverse titles or claims, other than such as is imparted by the records, are not founded upon any arbitrary provisions of law, but have their origin in the considerations of prudence and honesty which guide men in their ordinary business transactions. No man, on being told by the recorder that a certain deed had been filed in his office, and that it had been withdrawn, would doubt that the deed existed; and if he was intending to purchase the property, common prudence would dictate to him the necessity of making inquiry of the grantee for the deed, unless he was incorrectly advised that deeds took precedence solely from priority of record."<sup>1</sup> A purchaser who has knowledge of an error in the description of mortgaged property, or is able from his knowledge of the property to interpret the record, giving it the meaning intended, becomes a purchaser with notice.<sup>2</sup>

§ 736. **Time of payment of consideration.**—If the notice has been given to the intending purchaser before he has paid any part of the consideration, there is no doubt that he thus becomes a purchaser with notice, and if he sees proper to pay the money, he acquires a title subject to the rights of whose existence he had notice.<sup>3</sup>

<sup>1</sup> *Lawton v. Gordon*, 37 Cal. 202, 207.

<sup>2</sup> *Carter v. Hawkins*, 62 Tex. 393.

<sup>3</sup> *Hardingham v. Nicholls*, 3 Atk. 304; *Kitteridge v. Chapman*, 38 Iowa, 348; *Price v. McDonald*, 1 Md. 403; 54 Am. Dec. 657; *Wood v. Mann*, 1 Sum. 506; *Baldwin v. Sager*, 70 Ill. 503; *Maitland v. Wilson*, 3 Atk. 814; *English v. Waples*, 13 Iowa, 57; *Penfield v. Dunbar*, 64 Barb. 239; *Flagg v. Mann*, 2 Sum. 486; *Palmer v. Williams*, 24 Mich. 338. See *Farmers' Loan Co. v. Maltby*, 8 Paige, 361; *Blanchard v. Tyler*, 12 Mich. 339; 86 Am. Dec. 57; *Murray v. Ballou*, 1 Johns. Ch. 566; *Keys v. Test*, 33 Ill. 316; *Bennett v. Titherington*, 6 Bush, 192; *Haughwout*

But where a part payment has been made at the time of receiving notice, there is a difference of opinion. It is held in England that if notice is given before the whole of the consideration has been paid, the party is charged with notice.<sup>1</sup> In this country the authorities are divided. On the one hand, it is held that where payment has been made, but notice has been given before the delivery of the deed, the purchaser is affected with notice.<sup>2</sup> But on the other hand, it is held that the payment of the purchase money before the receipt of notice is sufficient to allow the purchaser to claim protection as a *bona fide* purchaser.<sup>3</sup> If a person taking a mortgage had a previous notice of a pre-existing lien upon the land, the fact that he has forgotten it at the time he took the mortgage will

*v. Murphy*, 21 N. J. Eq. (6 Green, O. E.) 118; *Wells v. Morrow*, 38 Ala. 125; *More v. Mahow*, 1 Cas. Oh. 34; *Story v. Lord Windsor*, 2 Atk. 630; *Tildesley v. Lodge*, 3 Smale & G. 543; *Moshier v. Knox College*, 32 Ill. 155; *Boone v. Chiles*, 10 Peters, 209; *Wormley v. Wormley*, 8 Wheat. 429; *Jones v. Stanley*, 2 Eq. Cas. Abr. 685; *Union Canal Co. v. Young*, 1 Whart. 410; 30 Am. Dec. 212; *Wilson v. Hunter*, 30 Ind. 466; *Patten v. Moore*, 32 N. H. 382; *Collinson v. Lister*, 7 De Gex, M. & G. 634; 20 Beav. 356; *Tourville v. Naish*, 3 P. Wms. 306; *Rayne v. Baker*, 1 Giff. 241; *Brown v. Welch*, 18 Ill. 343; 68 Am. Dec. 549; *Wigg v. Wigg*, 1 Atk. 382; *Schultze v. Houfes*, 96 Ill. 335.

<sup>1</sup> *Tildesley v. Lodge*, 3 Smale & G. 543; *Jones v. Stanley*, 2 Eq. Cas. Abr. 685; *Sharpe v. Foy*, Law R. 4 Ch. 35; *Rayne v. Baker*, 1 Giff. 241; *Story v. Lord Windsor*, 2 Atk. 630; *More v. Mahow*, 1 Cas. Oh. 34; *Wigg v. Wigg*, 1 Atk. 382; *Tourville v. Naish*, 3 P. Wms. 307; *Cotlinson v. Lister*, 7 De Gex, M. & G. 684; 20 Beav. 356.

<sup>2</sup> *Osborn v. Carr*, 12 Conn. 195; *Doswell v. Buchanan*, 3 Leigh, 394; 23 Am. Dec. 280; *Fash v. Ravesies*, 32 Ala. 451; *Duncan v. Johnson*, 13 Ark. 190; *Blight v. Banks*, 6 Mon. 192; 17 Am. Dec. 136; *Peabody v. Fenton*, 3 Barb. Oh. 451; *Simms v. Richardson*, 2 Litt. 274; *Grimstone v. Carter*, 3 Paige, 421; 24 Am. Dec. 230; *Blair v. Owles*, 1 Munf. 38; *Moore v. Clay*, 7 Ala. 742; *Wells v. Morrow*, 38 Ala. 125; *Bennett v. Titherington*, 6 Bush, 192; *Pillow v. Shannon*, 3 Yerg. 508; *Halstead v. Bank of Kentucky*, 4 Marsh. J. J. 554.

<sup>3</sup> *Leach v. Ansbacher*, 55 Pa. St. 85; *Carroll v. Johnson*, 2 Jones Eq. 120; *Gibler v. Trimble*, 14 Ohio, 323; *Baggarly v. Gaither*, 2 Jones Eq. 80; *Mut. etc. Society v. Stone*, 3 Leigh, 218. See on the general subject, *Baldwin v. Sager*, 70 Ill. 503; *Wormley v. Wormley*, 8 Wheat. 421; *Wheaton v. Dyer*, 15 Conn. 307; *Zollman v. Moore*, 21 Gratt. 313; *Phelps v. Morrison*, 24 N. J. Eq. 195. See *Morris v. Meek*, 57 Tex. 385.

not be sufficient to free him from the consequences of such notice.<sup>1</sup>

§ 737. **Intimate relationship or business connections.** As a question of evidence whether a person had notice, much attention has sometimes been paid to the circumstance that there was a close relationship or personal intimacy between the grantee and grantor. Thus, a person appointed an agent to purchase a piece of land, and gave him some money to pay on account. The agent's son subsequently bought the land with the knowledge of the father, and received a deed for it. The principal brought an action in ejectment for the land against the father and the son. The court held that it was not error to charge the jury that the knowledge by the son of the trust might be inferred from the relation of father and son existing between the defendants, and from their transactions as to the contract between the principal and the father, and the other circumstances of the case.<sup>2</sup> It is unnecessary to say that a *bona fide* purchaser for value of the real estate of a partnership, the legal title to which is vested in the copartners, or in one of them for the firm, will, if he possesses no notice of the equitable rights of others in it as a part of the copartnership funds, be protected upon the ground of his own equities as such purchaser. But where a person buys the undivided half of a planing-mill and other property from a surviving partner of a firm of housewrights, knowing that the mill was built with money belonging to the copartnership, and knowing that the dissolving firm, if not insolvent, was greatly in debt, and that the surviving partner had paid none of its debts, and where the deed

<sup>1</sup> Hunt v. Clark's Administrator, 6 Dana, 56.

<sup>2</sup> Trefts v. King, 18 Pa. St. 157. Said Coulter, J: "The judge told the jury that they ought to consider the relation of the parties being father and son, and their transactions in relation to the contract, and all the other evidence in the cause. This instruction was right. In regard to such transactions it is impossible to shut our eyes to the relations of the parties."

was taken, and the money paid secretly, the vendor absconding with it on the same night, the purchaser, notwithstanding that no proof can be adduced of his actual participation in the acts of his vendor, may be held to be affected by these circumstances with constructive notice of the breach of trust intended by the partner from whom he received his deed.<sup>1</sup> A person took a deed to land in his own name alone, but purchased it with money belonging jointly to himself, his mother, brother, and sister. To one of his individual creditors he subsequently made an offer to pay him by a sale or lease of the land, or to secure him by a mortgage upon it. The creditor took a mortgage, and said afterward to a third person that he preferred a mortgage for the reason that he feared that the title was not clear, and that other parties might claim some right to the land. The creditor was on intimate terms with the grantor, and his mother, brother, and sister, and there was nothing to show that any other person asserted any claim to the premises. The court held that notice on the part of the creditor of the rights of the mother, sister, and brother of the grantor, at the time he took the mortgage, was sufficiently shown by these and similar facts, and that his mortgage should be made subject to their equities.<sup>2</sup> But in all these cases the fact of relationship or intimacy has been connected with others, from all of which, taken together, the court drew the inference of notice. Notice, however, would not reasonably be inferred from the existence of close relationship or intimate acquaintance unconnected with other circumstances.<sup>3</sup>

§ 738. **Notice of a trust.**—If a person has notice of a trust and purchases the trust property from the trustee, he will hold the property thus acquired subject to the

<sup>1</sup> *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510.

<sup>2</sup> *Spurlock v. Sullivan*, 36 Tex. 511. See, also, *Hoxie v. Carr*, 1 Sum. 173, 192; *Flagg v. Mann*, 2 Sum. 487.

<sup>3</sup> *Dubois v. Barker*, 4 Hun, 80, 86.

same trust as that under which the trustee held it.<sup>1</sup> But if the purchaser has neither actual nor constructive notice of the trust, and acquires the title for a valuable consideration, he will hold the property freed from the trust.<sup>2</sup> Where the purchaser obtains his deed with notice of the

<sup>1</sup> *Le Neve v. Le Neve*, Amb. 436; *Liggett v. Wall*, 2 Marsh. A. K. 149; *Bailey v. Wilson*, 1 Dev. & B. Eq. 182; *Peebles v. Reading*, 8 Serg. & R. 495; *West v. Fitz*, 109 Ill. 425; *Murray v. Ballou*, 1 Johns. Oh. 566; *Wright v. Dame*, 22 Pick. 55; *Jones v. Shaddock*, 41 Ala. 362; *Wilkins v. Anderson*, 1 Jones, 399; *James v. Cowing*, 17 Hun, 256; *Reed v. Dickey*, 2 Watts, 459; *Smith v. Walter*, 49 Mo. 250; *Clarke v. Hackertorn*, 3 Yeates, 269; *Ryan v. Doyle*, 31 Iowa, 53; *Caldwell v. Carrington*, 9 Peters, 86; *Wormley v. Wormley*, 8 Wheat. 421; *Pugh v. Bell*, 1 Marsh. J. J. 403; *Cary v. Eyre*, 1 De Gex, J. & S. 149; *Case v. James*, 29 Beav. 512; *Potter v. Sanders*, 6 Hare, 1; *Kennedy v. Daly*, 1 Schoales & L. 355; *Crofton v. Ormsby*, 2 Schoales & L. 583; *Wigg v. Wigg*, 1 Atk. 383; *Adair v. Shaw*, 1 Schoales & L. 262; *Mackreth v. Symmons*, 19 Ves. 367; *Benzien v. Lenoir*, 1 Car. Law Rep. 504; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Ferras v. Oherry*, 2 Vern. 384; *Daniels v. Davidson*, 16 Ves. Sr. 249; *Brooke v. Bulkely*, 2 Ves. Sr. 498; *Grant v. Mills*, 2 Ves. & B. 306; *Mead v. Orrery*, 3 Atk. 238; *Birch v. Ellames*, 2 Anstr. 427; *Saunders v. Behew*, 2 Vern. 371; *Dunbar v. Tredennick*, 2 Ball & B. 319; *Jennings v. Moore*, 2 Vern. 609; 2 Brown Parl. C. 278; *Mansell v. Mansell*, 2 P. Wms. 681; *Phayre v. Peree*, 3 Dow, 129; *Oliver v. Piatt*, 3 How. 333; *Massey v. McIlwaine*, 2 Hill Eq. 426.

<sup>2</sup> See for various instances, *Trull v. Bigelow*, 16 Mass. 406; 8 Am. Dec. 144; *Dana v. Newhall*, 13 Mass. 498; *Connecticut v. Bradish*, 14 Mass. 296; *Boynton v. Rees*, 8 Pick. 329; 19 Am. Dec. 326; *Learned v. Tritch*, 6 Colo. 432; *Colesbury v. Bart*, 58 Ala. 573; *Brackett v. Miller*, 4 Watts & S. 102; *Lacy v. Wilson*, 4 Munf. 413; *Dixon v. Caldwell*, 15 Ohio St. 412; 86 Am. Dec. 487; *High v. Batte*, 10 Yerg. 335; *Blight v. Banks*, 6 Mon. 198; 17 Am. Dec. 136; *Alexander v. Pendleton*, 8 Cranch, 462; *Dillaye v. Commercial Bank*, 51 N. Y. 345; *Hamilton v. Mound City Mutual L. Ins. Co.*, 3 Tenn. Ch. 124; *Tompkins v. Powell*, 6 Leigh, 576; *Owings v. Mason*, 2 Marsh. A. K. 380; *Goodtitle v. Cummings*, 8 Blackf. 179; *Heilner v. Imbrie*, 6 Serg. & R. 401; *Brown v. Budd*, 2 Cart. 442; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Curtis v. Lanier*, 6 Munf. 42; *Griffith v. Griffith*, 9 Paige, 315; *Maywood v. Lubcock*, 1 Bail. Eq. 382; *Fletcher v. Peck*, 6 Cranch, 36; *Boone v. Chiles*, 10 Peters, 177; *Varick v. Briggs*, 6 Paige, 325; *Siddon v. Oharnells*, Bunb. 298; *Willoughby v. Willoughby*, 1 Term Rep. 765; *Charlton v. Low*, 3 P. Wms. 326; *Harcourt v. Knowell*, 2 Vern. 159; *Goleborn v. Alcock*, 2 Sim. 552; *Blake v. Hungerford*, Prec. Ch. 158; *Shine v. Gough*, 1 Ball & B. 536; *Jerrard v. Saunders*, 2 Ves. Jr. 457; *Sanders v. Deligne*, Freem. 123; *Jones v. Powles*, 3 Mylne & K. 581; *Walwyn v. Lee*, 9 Ves. 24; *Hughson v. Mandeville*, 4 Desaus. Eq. 87; *Watson v. Le Roy*, 6 Barb. 485; *Demarest v. Wykoop*, 3 Johns. Ch. 147; 8 Am. Dec. 467; *Howell v. Ash-*

trust, he cannot, by buying in other interests, defeat the interest of the *cestui que trust*.<sup>1</sup> Notice of the trust to the agent while engaged in the transaction is notice to the principal.<sup>2</sup> A person who secures a deed by fraud becomes a trustee, and if another take a deed from him with full knowledge of the fraud, such second grantee will hold the property as a trustee.<sup>3</sup> A deed made on a good, as distinguished from a valuable, consideration, will not be sufficient to bar the title of the *cestui que trust*.<sup>4</sup> To enable the purchaser to claim protection as a *bona fide* purchaser without notice of the trust, the money must have been paid before he received notice.<sup>5</sup> Where a deed made to a

more, 1 Stockt. Ch. 82; 57 Am. Dec. 371; *Mundine v. Pitts*, 14 Ala. 84; *Woodruff v. Cook*, 1 Gill & J. 270; *Whittick v. Kane*, 1 Paige, 202; *Halstead v. Bank of Kentucky*, 4 Marsh. J. J. 554; *Fletcher v. Peck*, 6 Cranch, 36; *Vattier v. Hinde*, 7 Peters, 252; *Holmes v. Stout*, 3 Green Ch. 492.

<sup>1</sup> *Brooke v. Bulkely*, 2 Ves. Sr. 498; *Kennedy v. Daly*, 1 Schoales & L. 37; *Maloney v. Kernan*, 2 Dru. & Walsh, 31; *Bovey v. Smith*, 1 Vern. 145.

<sup>2</sup> *Hood v. Fahnestock*, 8 Watts, 489; 34 Am. Dec. 489; *Bank of United States v. Davis*, 2 Hill, 451; *Aster v. Wells*, 4 Wheat. 466; *Jackson v. Winslow*, 9 Cowen, 13; *Hovey v. Blanchard*, 13 N. H. 145; *Jackson v. Leak*, 19 Wend. 339; *Winchester v. Baltimore R. R. Co.*, 4 Md. 231; *Griffith v. Griffith*, 9 Paige, 315; *Jackson v. Sharp*, 9 Johns. 163; 6 Am. Dec. 267; *Barnes v. McChristie*, 3 Pa. 67; *Bracken v. Miller*, 4 Watts & S. 108; *Fuller v. Bennett*, 2 Hare, 394; *Worsley v. Scarborough*, 3 Atk. 392; *Preston v. Tubbin*, 1 Vern. 286; *Tunstall v. Trappes*, 3 Sim. 301; *Espin v. Pemberton*, 3 De Gex & J. 547; *Maddox v. Maddox*, 1 Ves. 61; *Ashley v. Baillie*, 2 Ves. Sr. 368; *Tylee v. Webb*, 6 Beav. 552; *Finch v. Shaw*, 19 Beav. 500; *Warwick v. Warwick*, 3 Atk. 291; *Mountford v. Scott*, 3 Madd. 84; *Howard Ins. Co. v. Halsey*, 4 Seld. 271; 59 Am. Dec. 478; *Blair v. Owles*, 1 Munf. 38; *Westerwelt v. Hoff*, 2 Sand. 98; *Newstead v. Searles*, 1 Atk. 265; *Brotherton v. Hiatt*, 2 Vern. 574.

<sup>3</sup> *Smith v. Bowen*, 35 N. Y. 83; *Sadler's Appeal*, 87 Pa. St. 154; *Lyons v. Bodenhamer*, 7 Kan. 455; *Saunders v. Dehew*, 2 Vern. 271; *Pye v. George*, 1 P. Wms. 128.

<sup>4</sup> *Boone v. Baines*, 23 Miss. 136; *Patten v. Moore*, 32 N. H. 382; *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314; *Swan v. Ligan*, 1 McCord Ch. 232; *Upshaw v. Hargrove*, 6 Smedes & M. 292; *Frost v. Beekman*, 1 Johns. Ch. 288.

<sup>5</sup> *Warner v. Whittaker*, 6 Mich. 183; 72 Am. Dec. 65; *Dugan v. Vattier*, 3 Blackf. 245; 25 Am. Dec. 105; *Christie v. Bishop*, 1 Barb. Ch. 105; *Blanchard v. Tyler*, 12 Mich. 339; 86 Am. Dec. 57; *Dixon v. Hill*, 5 Mich. 404; *Thomas v. Stone*, Walk. Ch. 117; *Stone v. Welling*, 14 Mich. 514;

person as a trustee for a town did not disclose the existence of the trust, and the trustee bargained to sell the land to one who entered into possession and erected improvements, but received no deed, and was unaware of the equities of the town, it was held, in a suit in equity brought by the town to compel the execution of a deed, that, on the ground where the equities are equal, possession prevails, the decree should be for the amount of the purchase money paid for the land, and not for a conveyance.<sup>1</sup>

**§ 738 a. Designation of grantee as "trustee."**—The general rule that pervades the whole doctrine of notice is that, whenever sufficient facts exist to put a person of common prudence upon inquiry, he is charged with constructive notice of everything to which that inquiry, if prosecuted with proper diligence, would have led. Therefore, if a deed is made to a person designated "trustee," although the nature of the trust, or the beneficiary under it, is not disclosed, still a purchaser is obligated to inquire as to the nature and limitations of the trust.<sup>2</sup> In a case

*Perkinson v. Hanna*, 7 Blackf. 400; *Rhodes v. Green*, 36 Ind. 10; *Lewis v. Phillips*, 17 Ind. 108; 79 Am. Dec. 457; *Jackson v. Cadwell*, 1 Cowen, 622; *Heatley v. Finster*, 2 Johns. Ch. 19; *High v. Batte*, 10 Yerg. 555; *Jewett v. Palmer*, 7 Johns. Ch. 65; 11 Am. Dec. 401; *Patten v. Moore*, 32 N. H. 382; *Hunter v. Simrall*, 5 Litt. 62; *McBee v. Loftes*, 1 Strob. Eq. 90; *Palmer v. Williams*, 24 Mich. 333; *Story v. Winsor*, 2 Atk. 630; *Tourville v. Naish*, 3 P. Wms. 387; *Wigg v. Wigg*, 1 Atk. 384.

<sup>1</sup> *St. Johnsbury v. Morrill*, 55 Vt. 165. See, also, *Jeffersonville etc. R. R. Co. v. Oyler*, 60 Ind. 383; *Indiana B. & W. Ry. Co. v. McBroom*, 114 Ind. 198; 15 N. E. Rep. 831; *Paul v. Connersville etc. R. R. Co.* 51 Ind. 527; *Chicago etc. R. Co. v. Wright*, 153 Ill. 307; 38 N. E. Rep. 1062.

<sup>2</sup> *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; 55 N. W. Rep. 825; 40 Am. St. Rep. 299; *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467; *Shaw v. Spencer*, 100 Mass. 382; 97 Am. Dec. 107; 1 Am. Rep. 115; *Sturtevant v. Jacques*, 96 Mass. 526; *Loring v. Salisbury*, 125 Mass. 151; *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235; *Solari v. Snow*, 101 Cal. 387; 85 Pac. Rep. 1004. See, also, *Golson v. Fielder*, 2 Tex. Civ. App. 400; 21 S. W. Rep. 173. "It is a familiar doctrine," said Mitchell, J., "that a purchaser is chargeable with notice of facts recited in deeds under or through which he takes title; and, while the word 'trustee' in a deed gives no notice of the name of the beneficiary, or of the character of the trust, yet it does give notice of a trust of some description, which



in Massachusetts, where stock, issued to a person described as "trustee," had been pledged to secure his own debt, the court held that, unless this term should be regarded as a mere *descriptio personæ*, and rejected as a nullity, there was notice of the existence of a trust of some kind. It held, however, that this term showed that the holder was a trustee for someone whose name was not disclosed, and that, in legal effect, it was the same as if the beneficiary had been named, as all persons were charged with notice of the existence of a trust of some description.<sup>1</sup> Where a deed is signed by one of the grantors, on the assumption that he is the attorney in fact for the other, but he has in fact no authority, such signature is sufficient to charge the purchaser with notice of the character and extent of the principal's interest in the land, and of such pretended relation of agency existing at the time of, and antecedent to, the purchase of the land, and the purchaser acquires a title subject to the interest of the person described as principal.<sup>2</sup>

§ 739. Structures upon the land.—It has been frequently held, in accordance with the soundest equitable principles, that the fact that structures visible to every one exist upon land is sufficient to make it the duty of the purchaser to inquire by what right they exist, and to affect him with notice of an easement. If there is an open, graded railway track across land, with its embankments and excavations capable of being seen by everybody, a person who purchases the land under these circumstances takes his deed with notice of whatever rights in the track there may be outstanding in others. The warranty deed of his grantor is powerless to effect

imposes the duty of inquiry as to its character and limitations; and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have led": *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; 40 Am. St. Rep. 299.

<sup>1</sup> *Shaw v. Spencer*, 100 Mass. 382; 97 Am. Dec. 107; 1 Am. Rep. 115.

<sup>2</sup> *Solari v. Snow*, 101 Cal. 387.

such outstanding rights in third persons. "The purchaser of real estate in the possession of a third person," said Biddle, C. J., "is bound to take notice of such person's title to the possession, whether his title be legal or equitable. This is a familiar principle of law, and we think the same rule should apply to a railroad track, graded and established at the time the vendee makes his purchase. Such a track, he must know, is inconsistent with any exclusive right to the lands over which it runs."<sup>1</sup> Where land has been conveyed without a reservation, the occupation of an easement in land adjoining that conveyed is inconsistent with the grant. It follows, therefore, that a purchaser from the grantee in such deed has notice of a reservation by parol of the easement. A was the owner of a piece of land on which a mill had been erected, and he had the privilege of diverting the water into the appurtenant millrace on the land of B, who had an equitable title only. A subsequently obtained the legal title to the whole tract, and conveyed by deed the legal title of that part of the tract on which the race and dam stood to B, free from encumbrances. The deed contained covenants of seisin, but made no reservation or mention of the millrace. The deed was recorded. The fact that A subsequently occupied the mill and used the race was held to be a sufficient notice to a purchaser from B of a parol reservation in favor of A of the right to the race.<sup>2</sup>

**§ 740. Searching the record not alone sufficient.** When a person has received such information as to place upon him the duty of making an inquiry, he cannot discharge that duty by a mere examination of the records.<sup>3</sup>

<sup>1</sup> *Paul v. Connersville etc. R. R. Co.*, 51 Ind. 527, 530.

<sup>2</sup> *Randall v. Silverthorn*, 4 Pa. St. 173. For further illustrations of this rule, see *Hervey v. Smith*, 22 Beav. 299; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, 478; *Blatchley v. Osborn*, 33 Conn. 226; *Hoy v. Bramhall*, 19 N. J. Eq. 563; 97 Am. Dec. 287; *Davis v. Sear*, Law R. 7 Eq. 427.

<sup>3</sup> *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Littleton v. Giddings*, 47 Tex. 109; *Munroe v. Eastman*, 31 Mich. 283; *Brinkman v. Jones*, 44 Wis. 498. See, also, *Witter v. Dudley*, 42 Ala. 616.

"The record, consequently, did not disprove the fact of which they were notified, but was merely silent on the subject; and to hold that they might rely upon it without further inquiry, would be equivalent to holding that notice of an unrecorded deed must always be ineffectual, at least unless the deed itself is produced. The authorities warrant no such doctrine, and it is inconsistent with the statute itself, which defeats such unrecorded deeds only at the instance of subsequent purchasers in good faith whose deeds are duly recorded. There is no ground for saying that one is a purchaser in good faith who, being notified of an unrecorded deed, and having the means of determining the truth of the notice, instead of making use of such means, resorts only to a record which can give him no information respecting unrecorded instruments, and then purchases in disregard of the rights of the real owner. A second purchaser defeats the first conveyance only by bringing himself within the letter of the statute; but he is not within it, if knowingly he buys of one who has no title to sell."<sup>1</sup>

§ 741. **Further inquiry.**—To say that an examination of the record alone is sufficient, is in effect to defeat the doctrine of notice. An inquiry should at least be made among the vendor's neighbors.<sup>2</sup> A mortgage was made to a railroad company, but was defectively recorded. A person subsequently purchased a part of the mortgaged premises, and "had heard that there was a defective railroad mortgage upon them, but did not look for it, because his abstract did not show it." He was made a defendant in an action upon the mortgage, and it was held that he must be considered as having had actual notice of the mortgage.<sup>3</sup> But where a person equitably entitled to a conveyance is in the open and adverse possession of the premises, but the legal owner fraudulently mortgages the

<sup>1</sup> Mr. Justice Cooley, in *Shotwell v. Harrison*, 30 Mich. 179, in which case *Barnard v. Oampau*, 29 Mich. 162, is distinguished.

<sup>2</sup> *Littleton v. Gidding*, 47 Tex. 109.

<sup>3</sup> *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772.

land to one who acts in good faith, and has no knowledge of the possession and claims of the party equitably entitled to a conveyance, the mortgagee is not chargeable with notice because he did not inquire who was in possession, and confined his search to the record title.<sup>1</sup> The records will protect a purchaser examining them so far as they can protect him, but he necessarily assumes the risk that the actual state of the title may not correspond with that which the records disclose.<sup>2</sup>

§ 742. **Contradiction of information.**—Where the grantor says that his title has been defective, or has been encumbered, the purchaser has received sufficient information to put him upon inquiry, and the fact that the grantor adds that his title has been made perfect, or the encumbrance has been removed, will not relieve the purchaser from making inquiry, and determining this fact for himself.<sup>3</sup> In one case the court said that it must have been known to a purchaser “that a man who was proposing to sell land, if he was doing it in fraud of the heirs of his vendee, could easily manufacture a tale of falsehood, and would do it. If it would be sufficient diligence to rely upon his mere word of denial, and stop further inquiry on that account, it would not likely be wanting in any case.”<sup>4</sup> If a purchaser is informed by his grantor that there is a mortgage upon the property, but that the mortgage has been satisfied, and he acts upon this statement without making further inquiry, he does so at his own peril. Before taking his deed, he should have endeavored to ascertain the truth of the statement from the mortgagee.<sup>5</sup> But where the information is given by a stranger, accompanied by a statement

<sup>1</sup> *Harral v. Leverty*, 50 Conn. 46; 47 Am. Rep. 608.

<sup>2</sup> *Reck v. Clapp*, 98 Pa. St. 581.

<sup>3</sup> *Price v. McDonald*, 1 Md. 403; 54 Am. Dec. 657; *Littleton v. Giddings*, 47 Tex. 109; *Hudson v. Warner*, 2 Har. & G. 415; *Bunting v. Ricks*, 2 Dev. & B. Eq. 130; *Russell v. Petree*, 10 Mon. B. 184. See *Rogers v. Jones*, 8 N. H. 264; *Jones v. Smith*, 1 Hare, 43.

<sup>4</sup> *Littleton v. Giddings*, 47 Tex. 109, 118.

<sup>5</sup> *Russell v. Petree*, 10 Mon. B. 184, 186.

that the adverse claim no longer exists, the rule is different.<sup>1</sup>

§ 743. **What is due inquiry.**—It is impossible to lay down any absolute, unqualified rule to determine what is the due inquiry which a person is compelled to make when he has received such information as to make it his duty to inquire. The law holds him to good faith and reasonable diligence. Each case must depend for its decision upon its own peculiar facts. Still it is apparent to every reasonable man, that by resort to certain sources for information he will in all probability learn the truth. He may not learn the true facts after he has made inquiry, but a neglect to prosecute his search in certain directions is sufficient to show that he has not made that due inquiry which the law exacts. He should, for instance, make inquiry of his grantor as to the truth of any matter upon which he is put upon inquiry, and an omission to do so would manifest an absence of due care.<sup>2</sup> He should also examine the records which may give him the very information he seeks. If he fails to do so, he may be said to have failed in making due inquiry.<sup>3</sup>

§ 744. **Third persons.**—And in many cases the proper course to pursue would be to make inquiry of third persons. When such a course is the one that a reasonable and prudent man would adopt, it must be pursued, or else there will not be sufficient diligence to enable the purchaser to say that he has made due inquiry.<sup>4</sup>

<sup>1</sup> *Buttrick v. Holden*, 13 Met. 355; *Williamson v. Brown*, 15 N. Y. 354; *In re Bright's Trusts*, 21 Beav. 430; *Rogers v. Wiley*, 14 Ill. 65; 56 Am. Dec. 491.

<sup>2</sup> *Sergeant v. Ingersoll*, 7 Pa. St. 340. See *Espin v. Pemberton*, 3 De Gex & J. 547. But see *Grundies v. Reid*, 107 Ill. 304.

<sup>3</sup> *Barnard v. Campan*, 29 Mich. 162; *Van Keuren v. Central R. R.*, 38 N. J. L. 165; *Bellas v. McCarty*, 10 Watts, 13, 28; *Jackson v. Van Valkenburgh*, 8 Cowen, 260.

<sup>4</sup> *Littleton v. Giddings*, 47 Tex. 109; *Witter v. Dudley*, 42 Ala. 616; *Russell v. Swezey*, 22 Mich. 235; *Penney v. Waits*, 1 Macn. & G. 150, 165; *Broadbent v. Barlow*, 3 De Gex, F. & J. 570; *Hewitt v. Loosemore*, 9 Hare, 449; *Hopgood v. Ernest*, 3 De Gex, J. & S. 116; *Atterbury v.*

§ 745. **Presumption may be rebutted.**—The presumption that a person has knowledge of such facts as he might learn after making due inquiry, when he has notice of such facts as to put him upon inquiry, is not conclusive. He may rebut the presumption by showing that he made due inquiry and did not acquire the knowledge. "The true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."<sup>1</sup>

Wallis, 8 De Gex, M. & G. 454; Maxfield v. Burton, Law R. 17 Eq. 15. And see Epley v. Witherow, 7 Watts, 163; McGehee v. Gondrat, 20 Ala. 95; Hunt v. Elmes, 2 De Gex, F. & J. 578; Greenfield v. Edwards, 2 De Gex, J. & S. 582; Ware v. Lord Egmont, 4 De Gex, M. & G. 460; Wilson v. McCullough, 23 Pa. St. 440; 62 Am. Dec. 347; Credland v. Potter, Law R. 10 Ch. 8; Ratcliffe v. Barnard, Law R. 6 Ch. 652; Roberts v. Croft, 2 De Gex & J. 1.

<sup>1</sup> Williamson v. Brown, 15 N. Y. 354, 360, per Selden, J., and cases cited. See, also, Jones v. Smith, 1 Hare, 43; Hewitt v. Loosemore, 9 Hare, 449; Whitbread v. Boulnois, 1 Younge & C. 303; Flagg v. Mann, 2 Sum. 486, 554; Hanbury v. Litchfield, 2 Mylne & K. 629; Griffith v. Griffith, 1 Hoff. Ch. 153; Hunt v. Elmes, 2 De Gex, F. & J. 578; Espin v. Pemberton, 3 De Gex & J. 547. In Rogers v. Jones, 8 N. H. 264, 269, Mr. Justice Parker said: "To say that he was put upon inquiry, and that having made all due investigation without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one really did exist, would be absurd." See, to same effect, Acer v. Westcott, 46 N. Y. 384; 7 Am. Rep. 355; McGehee v. Gondrat, 20 Ala. 95; Schweiss v. Woodruff, 73 Mich. 473; 41 N. W. Rep. 511; Thompson v. Pioche, 44 Cal. 508; Parker v. Conner, 93 N. Y. 118; 45 Am. Rep. 178; Bell v. Davis, 75 Ind. 314; Wilson v. Williams, 25 Tex. 54. That the question of diligence is one of fact, see Schutt v. Large, 6 Barb. 373; Nute v. Nute, 41 N. H. 60; Rogers v. Wiley, 14 Ill. 65; 56 Am. Dec. 491; Parker v. Conner, 93 N. Y. 118; 45 Am. Rep. 178; Ohiles v. Conley, 2 Dana, 21; McMechan v. Griffing, 3 Pick. 149; 15 Am. Dec. 198. That it is one of law, see Morris v. Daniels, 85 Ohio St. 406; Pollak v. Davidson, 87 Ala. 551.

A deed conveying the premises to the wife of the tenant in possession was duly executed and delivered. The deed contained a condition that if the wife paid a certain sum in a specified time, the deed should be in force, otherwise it should be void. The deed was not acknowledged, but was left in the hands of the grantor for the purpose of having him acknowledge it. The grantor on the same day made a mortgage to another person. At the time of making the first mortgage, he exhibited the first deed and declared that no delivery of it had been made. There was no evidence of any change of possession or acts of ownership after the execution of the first deed, nor was there any other fact to give notice of its being a valid conveyance. It was held under these circumstances that the mortgagee whose conveyance was first recorded had the priority.<sup>1</sup> But if the purchaser fails to make due inquiry, the presumption of notice is conclusive.<sup>2</sup>

<sup>1</sup> *Rogers v. Jones*, 8 N. H. 264.

<sup>2</sup> *Maul v. Rider*, 59 Pa. St. 167; *Chicago etc. R. R. v. Kennedy*, 70 Ill. 350; *Kennedy v. Green*, 3 Mylne & K. 699; *Helms v. Chadbourne*, 45 Wis. 60; *Loughbridge v. Bowland*, 52 Miss. 546; *Mullison's Estate*, 68 Pa. St. 212; *Maxfield v. Burton*, Law R. 17 Eq. 15; *Petcher v. Rawlins*, Law R. 11 Eq. 53; *Briggs v. Jones*, Law R. 10 Eq. 92; *Bellas v. McCarty*, 10 Watts, 13. On the question as to whether a subsequent purchaser is presumed to have become such in good faith the authorities are divided. On one hand it is held that he is presumed to be a purchaser in good faith, and that he who attacks the deed has the burden of proof: *Hiller v. Jones*, 66 Miss. 636; *Vest v. Michie*, 31 Gratt. 149; 31 Am. Rep. 722; *Roll v. Rea*, 50 N. J. L. 264; *Foust v. Moorman*, 2 Ind. 17; *Marshall v. Dunham*, 66 Me. 539; *Holmes v. Stout*, 10 N. J. Eq. 419; *Anthony v. Wheeler*, 130 Ill. 128; 17 Am. St. Rep. 281; *Coleman v. Barklew*, 27 N. J. L. 357; *Rogers v. Wiley*, 14 Ill. 65; 56 Am. Dec. 491; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62; *Wilkins v. Anderson*, 11 Pa. St. 399; *Spofford v. Weston*, 29 Me. 140; *Pomroy v. Stevens*, 11 Met. 244; *Butler v. Stevens*, 26 Me. 484; *McGahee v. Sneed*, 1 Dev. & B. Eq. 333; *Bush v. Golden*, 17 Conn. 594; *Lacustrine Fertilizer Co. v. Lake Guano & F. Co.*, 82 N. Y. 476; *Ryder v. Rush*, 102 Ill. 338. On the other hand, it is held that one claiming to be innocent purchaser must prove the facts showing him to be such. See *Moore v. Curry*, 36 Tex. 668; *Watkins v. Edwards*, 23 Tex. 447; *Hamman v. Keigwin*, 39 Tex. 34; *Colton v. Seavey*, 22 Cal. 496; *Galland v. Jackman*, 26 Cal. 79; 85 Am. Dec. 172; *Landers v. Bolton*, 26 Cal. 393; *Root v. Bryant*, 57 Cal. 48; *Wallace v. Wilson*, 30 Mo. 335; *Nolen v. Heirs of Gwyn*, 16 Ala. 725; *Sillyman v. King*, 36 Iowa, 207.



§ 746. **Second purchaser without notice.**—Although the first purchaser has notice, and takes title accordingly, yet a second purchaser from him for value and without notice is a *bona fide* purchaser, and takes a valid title.<sup>1</sup> The second purchaser is entitled to protection for his own good faith. It would be inequitable to visit upon him the consequences of the notice possessed by his grantor. An additional reason for this rule is the insecurity of titles that would otherwise result. If a man, acting in the utmost good faith, paying a valuable consideration, and not in any manner charged with notice, should be liable to lose his title because the person from whom he purchased had notice, no title would be safe. Its validity would depend upon the fact that all the persons through whom the last owner derived title were entirely free from notice of the rights of others, and a title apparently invulnerable might at any time be overthrown. Where A executed a deed to B, which was never recorded, B conveyed to C by a deed which was placed on record, and subsequently B surrendered to A the deed received from him, and it was then destroyed, and D, who knew of the fraudulent cancellation of A's first deed, received a deed from A, and he, D, conveyed to E, a purchaser for a valuable consideration, without notice of the fraud, it

<sup>1</sup> Price v. Martin, 46 Miss. 489; Paris v. Lewis, 85 Ill. 597; Tompkins v. Powell, 6 Leigh, 576; Hardin v. Harrington, 11 Bush, 367; Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; Varick v. Briggs, 6 Paige, 323; Demarest v. Wynkoop, 3 Johns. Oh. 129; 8 Am. Dec. 467; Glidden v. Hunt, 24 Pick. 221. And see Fallass v. Pierce, 30 Wis. 443; Jackson v. Van Valkenburgh, 8 Cowen, 260; Truluck v. Peeples, 3 Kelly, 446; Knox v. Silloway, 10 Me. 201; Mallory v. Stodder, 6 Ala. 801; Connecticut v. Bradish, 14 Mass. 296; Somes v. Brewer, 2 Pick. 184; 13 Am. Dec. 406; Wood v. Mann, 1 Sum. 506; Galatian v. Erwin, Hopk. Oh. 43; Snyder v. Board of Commrs. of Boulder Co., 8 West Coast Rep. 533; Sayward v. Thompson, 11 Wash. 706; 40 Pac. Rep. 379; Lee v. Oato, 27 Ga. 637; 73 Am. Dec. 746; Hoit v. Russell, 56 N. H. 569; Bell v. Twilight, 18 N. H. 159; 45 Am. Dec. 367; Moore v. Curry, 36 Tex. 668; Sydnor v. Roberts, 13 Tex. 598; 65 Am. Dec. 84; Hill v. McNichol, 76 Me. 314; Slattery v. Schwannecke, 118 N. Y. 543; 23 N. E. Rep. 922; Decker v. Boice, 83 N. Y. 215; Danbury v. Robinson, 14 N. J. Eq. 213; 82 Am. Dec. 244; Smith v. Vreeland, 16 N. J. Eq. 198; Jones v. Hudson, 23 S. O. 494.

was decided that E's title was superior to that of C.<sup>1</sup> "Courts of equity grant relief against purchasers with notice for the reason alone that to purchase under such circumstances is a fraud on the rightful claimant or owner; but this rule has never been carried so far as to grant relief against an innocent purchaser, although his grantor may have purchased in bad faith, and to do so would be to subvert the very principle upon which the relief is given."<sup>2</sup>

§ 747. **Second purchaser with notice from bona fide purchaser.**—Where a person has bought land for value, without notice, or in other words, is a *bona fide* purchaser, he has a valid title so far as rights are concerned, of which he has neither actual nor constructive notice. He is the owner of the property. But his ownership would be practically valueless to him unless the right of disposition was an inseparable incident of it. To say that he can sell it only to persons who have no notice, is to limit the field of purchasers, and possibly to deprive him of the power of disposition altogether. His title is worth nothing to him unless he has the right to sell to whoever desires to buy. It is for these reasons, a well-settled rule that when a *bona fide* purchaser acquires land, he holds it free from equities of which he had no notice, and may convey his title as he holds it to others who have notice.<sup>3</sup> And the same rule in relation to the rights

<sup>1</sup> *Knox v. Silloway*, 10 Me. 201.

<sup>2</sup> *Hardin's Executors v. Harrington*, 11 Bush, 367, 372, per Pryor, J.

<sup>3</sup> *Funkhouser v. Lay*, 78 Mo. 458; *Harrison v. Forth*, Prec. Ch. 51; *Brandlyn v. Ord*, 1 Atk. 571; *Varick v. Briggs*, 6 Paige, 323; *Lindsey v. Rankin*, 4 Bibb, 482; *Holmes v. Stout*, 3 Green Ch. 492; *Dana v. Newhall*, 13 Mass. 498; *Fletcher v. Peck*, 6 Cranch, 87; *Webster v. Van Steenbergh*, 46 Barb. 211; *Moore v. Curry*, 36 Tex. 668; *Allison v. Hagan*, 12 Nev. 38; *McShirley v. Birt*, 44 Ind. 382; *Blight's Heirs v. Banks*, 6 Mon. 192; 17 Am. Dec. 136; *Curtis v. Lunn*, 6 Munf. 42; *Shinn v. Shinn*, 15 Bradw. (Ill.) 141; *Trull v. Bigelow*, 16 Mass. 406; 8 Am. Dec. 144; *Lacy v. Wilson*, 4 Munf. 313; *Halstead v. Bank of Kentucky*, 4 Marsh. J. J. 554; *Ferrars v. Cherry*, 2 Vern. 383; *Lowther v. Carlton*, 2 Atk. 242; *McQueen v. Farquhar*, 11 Ves. 467; *Sweet v. Southcote*, 2 Bro. Ch. 66; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Vattier v.*

of subsequent purchasers applies in case of fraud, as well as in those cases which we have been treating. "If a suit be brought to set aside a conveyance obtained by fraud," said Chief Justice Marshall, "and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who held the property long before he

Hinde, 7 Peters, 252; Griffith v. Griffith, 9 Paige, 315; Fletcher v. Peck, 6 Cranch, 87; Alexander v. Pendleton, 8 Cranch, 462; Boone v. Chiles, 10 Peters, 177; Boynton v. Rees, 8 Pick. 329; 19 Am. Dec. 326; Rutgers v. Kingsland, 3 Halst. Ch. 178; Bracken v. Miller, 4 Watts & S. 102; Abadie v. Lobero, 36 Cal. 390; Rorer Iron Co. v. Trout, 83 Va. 397; 5 Am. St. Rep. 285; 2 S. E. Rep. 713; Hill v. McNichol, 76 Me. 314; Blatchley v. Osborn, 33 Conn. 226; Whitfield v. Riddle, 78 Ala. 99; Bartlett v. Varner, 56 Ala. 580; Fargason v. Edrington, 49 Ark. 207; 4 S. W. Rep. 763; Holmes v. Buckner, 67 Tex. 107; 2 S. W. Rep. 452; Lewis v. Johnson, 68 Tex. 448; 4 S. W. Rep. 644; Gulf etc. Ry. Co. v. Gill, 5 Tex. Civ. App. 496; 23 S. W. Rep. 142; Grace v. Wade, 45 Tex. 522; Peterson v. McCauley (Tex. Civ. App.), 25 S. W. Rep. 826; Arrington v. Arrington, 114 N. C. 151; 19 S. E. Rep. 351; Wallace v. Cohen, 111 N. O. 103; 15 S. E. Rep. 892; Shotwell v. Harrison, 22 Mich. 410; Brown v. Cody, 115 Ind. 484; 18 N. E. Rep. 9; Klinger v. Lemler, 135 Ind. 77; 34 N. E. Rep. 698; Arnold v. Smith, 80 Ind. 417; Trentman v. Eldridge, 98 Ind. 525; Evans v. Nealis, 69 Ind. 148; Sharpe v. Davis, 76 Ind. 17; Doyle v. Wade, 23 Fla. 90; 11 Am. St. Rep. 334; 1 So. Rep. 516; Eldridge v. Post, 20 Fla. 579; Day v. Clark, 25 Vt. 397; Barber v. Richardson, 57 Vt. 408; Church v. Ruland, 64 Pa. St. 432; Ashton's Appeal, 73 Pa. St. 153; Colquitt v. Thomas, 8 Ga. 258; Lee v. Cato, 27 Ga. 637; 73 Am. Dec. 746; Pierce v. Faunce, 47 Me. 507; Brackett v. Ridlon, 54 Me. 426; Card v. Patterson, 5 Ohio St. 319; East v. Pugh, 71 Iowa, 162; Henninger v. Heald, 51 N. J. Eq. 74; 29 Atl. Rep. 190; Roll v. Rea, 50 N. J. L. 264; 12 Atl. Rep. 905; Glidden v. Hunt, 24 Pick. 221; Lacustrine Fer. Co. v. Lake Guano & F. Co., 82 N. H. 476; St. Joseph Mfg. Co. v. Daggett, 84 Ill. 556; Bartlett v. Varner, 56 Ala. 580; Calahan v. Monroe, 56 Ala. 303. And see Bumpus v. Plattner, 1 Johns. Ch. 213; Demarest v. Wynkoop, 3 Johns. Oh. 129; 8 Am. Dec. 467; Mott v. Clark, 9 Barr. 399; 49 Am. Dec. 566; Church v. Church, 1 Casey, 278; Filby v. Miller, 1 Casey, 264; City Council v. Page, Spear Eq. 159. But see Johns v. Sewell, 33 Ind. 1, where it was held that where the first purchaser is a mere volunteer, this rule does not apply.

acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.<sup>1</sup>” Where a person fraudulently acquires the equity of redemption of land on which there is a *bona fide* mortgage, he may, by purchasing at the mortgage sale obtain an indefeasible title.<sup>2</sup>

§ 748. **Former owner with notice.**—There is another rule in relation to this subject, which, while it may be considered an exception, is clearly just. If the title be conveyed to a person without notice, he is a *bona fide* purchaser and may transfer his title, freed from equities of which he had no notice, to all persons but a *former owner* of the same land who had notice. When the land comes back to such a person again, it is subject to all the equities that attached to it while he held it.<sup>3</sup>

§ 749. **Tenant in common without notice.**—A tenant in common who has notice cannot avail himself of the want of notice of his cotenant. We have referred to a case in a previous section where this principle was involved.<sup>4</sup> The reason that courts give to a purchaser without notice, protection, is, that having acted in good faith, he should not suffer from the negligence of him whose duty it was to notify the public of his interest by the means afforded by law. But if he has notice, he cannot

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87, 133. And see *Galatian v. Erwin*, Hopk. Ch. 48; *Wood v. Mann*, 1 Sum. 506; *Somes v. Brewer*, 2 Pick. 184; 13 Am. Dec. 406.

<sup>2</sup> *Funkhouser v. Lay*, 78 Mo. 458.

<sup>3</sup> *Ashton's Appeal*, 73 Pa. St. 153; *Trentman v. Eldridge*, 98 Ind. 525; *Church v. Ruland*, 64 Pa. St. 432; *Kennedy v. Daly*, 1 Schoales & L. 355; *Troy City Bank v. Wilcox*, 24 Wis. 671; *Allison v. Hagan*, 12 Nev. 38; *Schutt v. Large*, 6 Barb. 373; *Church v. Church*, 25 Pa. St. 278.

<sup>4</sup> See § 734, *ante*.

claim any benefit from the fact that another has no notice. The latter may claim this protection, if otherwise he would suffer injury. But this defense is personal to himself. His want of notice cannot avail a cotenant, who must suffer the consequences arising from knowledge of an outstanding encumbrance. In case of a partition, the encumbrance may be enforced against the part of the land held by him in severalty.<sup>1</sup>

**§ 750. Notice of intention to execute a deed.**—A purchaser is not bound by notice of the intention of parties to execute a deed. Until the deed is actually executed, notice of what the parties have in contemplation cannot affect him. Until the intention has been carried out, the title has not passed, and it may be that the intention of the parties will be altered by other causes, or may fail of being consummated. A purchaser had information that a draft of a deed had been prepared, but not that the deed had in fact been executed. It was held that although the deed had really been executed, he could not be charged with notice of it as a deed.<sup>2</sup> So, on the same principle, where one or two creditors of an insolvent debtor knew only that a deed was being executed to convey the land of the debtor to the other creditor, and attached the land before the deed was recorded, but not before its execution and delivery, the lien of the attach-

<sup>1</sup> *Blatchley v. Osborn*, 33 Conn. 226. The court said that if E "saw fit heedlessly to accept of less than he was justly entitled to in making the division, when he had full knowledge of Blatchley's rights, he clearly ought not to be permitted now to deprive the petitioner of his rights to the passway, because of an injury which he has brought upon himself. The petitioner must suffer a great wrong if deprived of his passway, and he is in every respect an innocent party. The respondent does not stand in this favorable light toward the petitioner, whose equitable interest he attempted to take away on the ground that it had not become vested in him by virtue of any legally recorded deed, and if his speculation instead of proving a success has operated to his pecuniary injury, it is the subject of less regret than would have been occasioned if he had succeeded in unjustly depriving the petitioner of his equitable ownership in the passway."

<sup>2</sup> *Cothay v. Sydenham*, 2 Bro. Ch. 291.

ment was allowed to prevail against the deed. "It was not, therefore," said Parker, C. J., "the knowledge of an intent to convey or attach, which will prevent the legal effect of an attachment by another creditor, which gets to be first in point of time, but the knowledge of an actual passing of the title which is complete against everyone with notice, whether by registry or personal."<sup>1</sup>

§ 751. **Fraud.**—Where a person is asked if he has an encumbrance or claim upon an estate, and answers that he has not, he will, if the circumstances are strong enough to justify a court in pronouncing him guilty of fraud, be postponed in the enforcement of his rights to the party whom he has misled.<sup>2</sup> "There is no principle better settled, nor one founded on more solid considerations of equity and public utility, than that which declares that if one knowingly, though he does it passively by looking on, suffers another to purchase and spend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. . . . In equity, when a man has been silent when in

<sup>1</sup> *Cushing v. Hurd*, 4 Pick. 252, 256; 16 Am. Dec. 335. See, also, *Brackett v. Wait*, 6 Vt. 411; *Stewart v. Thompson*, 3 Vt. 264; *Denton v. Perry*, 5 Vt. 382; *Warden v. Adams*, 15 Mass. 233, 237; *McMechan v. Griffing*, 3 Pick. 149, 154; 15 Am. Dec. 198. And see *Priest v. Rice*, 1 Pick. 168; 11 Am. Dec. 156.

<sup>2</sup> *Fay v. Valentine*, 12 Pick. 40; 22 Am. Dec. 397; *Miller v. Bingham*, 29 Vt. 82; *Platt v. Squire*, 12 Met. 494; *McKelvey v. Truby*, 4 Watts & S. 323; *Lee v. Munroe*, 7 Cranch, 366; *Chester v. Greer*, 5 Humph. 26; *Heane v. Rogers*, 9 Barn. & C. 577; *Stafford v. Vallou*, 17 Vt. 329; *Otis v. Sill*, 8 Barb. 102; *Lesley v. Johnson*, 41 Barb. 359; *Chapman v. Hamilton*, 19 Ala. 121; *Folk v. Beidelman*, 6 Watts, 339; *Lee v. Kirkpatrick*, 1 McCart. Eq. (14 N. J. Eq.) 264; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Schitheimer v. Eiseman*, 7 Bush, 298; *Storrs v. Barker*, 6 Johns. Ch. 166; 10 Am. Dec. 316; *Berrisford v. Milward*, 2 Atk. 49; *Evans v. Bicknell*, 6 Ves. 174; *Plumb v. Fluitt*, 2 Anst. 432; *Beckett v. Cordley*, 1 Brown Oh. 353; *Peter v. Russell*, 1 Eq. Cas. Abr. 322; *Broome v. Beers*, 6 Conn. 198; *L'Amoureux v. Vandenburg*, 7 Paige, 316; 32 Am. Dec. 635. And see, also, *Bright v. Boyd*, 1 Story, 478; *Nicholson v. Hooper*, 4 Mylne & C. 179; *Chautauque Co. Bank v. White*, 6 Barb. 589; *Carr v. Wallace*, 7 Watts, 394; *Pilling v. Armitage*, 12 Ves. 78; *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291.

conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent."<sup>1</sup> An owner of land executed two mortgage deeds of it on the same day to A and B, the interest of A having afterward been assigned to C. D attached the land as the property of B, and obtained a judgment against him. He sent an agent to C, who knew of the judgment, to ascertain if his mortgage was entitled to priority, and C responded that there was no priority, that both instruments had been executed at the same time, and that A had given a writing to that effect. This representation was not true, as the mortgage to A had been delivered first. But D took a mortgage from B to secure his claim, B being insolvent, and it was held that C was precluded by these facts from claiming the priority to which otherwise he would have been entitled.<sup>2</sup> But there is no fraud if the holder of a recorded mortgage prepare as counsel a subsequent mortgage, and maintain silence as to his own.<sup>3</sup> If, under a contract to purchase land, the nonpayment of the joint and several purchase-money note on a day specified is to work a forfeiture, and if two of the obligors fraudulently neglect to pay their share, a forfeiture thereby resulting, and if, at the same, time they deposit the money in the hands of another to avail himself of the forfeiture, a purchaser with notice can acquire no rights superior to those of the other obligors.<sup>4</sup> Where a deed is duly signed and acknowledged by husband and wife, a purchaser has the right to presume that the wife acted freely and with full knowledge of the effect of the deed. If he has no knowledge of the fraud of others in inducing her to sign, he is not affected.<sup>5</sup>

<sup>1</sup> Carr v. Wallace, 7 Watts, 394, 400, per Rogers, J. See, also, Epley v. Witherow, 7 Watts, 163; McCormick v. McMurtrie, 4 Watts, 195.

<sup>2</sup> Broome v. Beers, 6 Conn. 198.

<sup>3</sup> Paine v. French, 4 Ohio, 318. See Palmer v. Palmer, 48 Vt. 69; Brinckerhoff v. Lansing, 4 Johns. Ch. 65; 8 Am. Dec. 533. See, also, Marston v. Brackett, 9 N. H. 336; Rice v. Dewey, 54 Barb. 455.

<sup>4</sup> Hulett v. Fairbanks, 40 Ohio St. 233.

<sup>5</sup> Pierce v. Fort, 60 Tex. 464.



§ 752. *Negligence.*—There may be cases where a person has acted so negligently as to put it in the power of another to induce a third person to purchase in ignorance of the existence of other rights, and the party guilty of such negligence may lose the priority of his claim.<sup>1</sup> Thus, an owner of land mortgaged it to A, and afterward confessed judgment in favor of B. Later, he and his wife executed a deed of the land to C, and on the day following the execution of the deed, A executed a release to the mortgagor and former owner, reciting payment of the mortgage debt, and some days subsequently C executed a mortgage to A. The court held, that although the mortgage debt may not have been paid, yet A by releasing the mortgage, and reciting payment of the debt, forfeited the benefit of the mortgage lien, and that all liens attaching to the property prior to the date of the second mortgage were superior to it.<sup>2</sup> A somewhat hard case under this principle is where a mortgagee canceled his mortgage and took a deed of the land, but prior to the execution of the deed, the mortgagor had executed a second mortgage upon the land. Under these circumstances the decision was that in the absence of fraud the first mortgage would not be revived, nor would the second mortgagee lose the benefit of his priority obtained by the cancellation of the first mortgage.<sup>3</sup>

<sup>1</sup> See *Waldron v. Sloper*, 1 Drew. 193; *Briggs v. Jones*, Law R. 10 Eq. 92; *Rice v. Rice*, 2 Drew. 73; *Frazee v. Inslee*, 2 N. J. Eq. (1 Green) 239; *Banta v. Garmo*, 1 Sand. Ch. 383; *Garland v. Harrison*, 17 Mo. 282; *Woollen v. Hillen*, 9 Gill, 185; 52 Am. Dec. 690; *Smith v. Brackett*, 36 Barb. 571; *Campbell's Appeal*, 29 Pa. St. 401; 72 Am. Dec. 641; *Hewit v. Loosemore*, 9 Hare, 443; *Neidig v. Whiteford*, 29 Md. 178.

<sup>2</sup> *Neidig v. Whiteford*, 29 Md. 178.

<sup>3</sup> *Frazee v. Inslee*, 2 N. J. Eq. (1 Green) 239. "In the absence of any proof of fraud by the complainant or his agent," said the Chancellor, "when the mortgage was canceled intentionally and understandingly by the defendant, and a deed taken for the same property, I cannot, upon any safe principle, revive the mortgage, or prevent the complainant from reaping the benefit of his rights as a first mortgagee. This would be giving encouragement to negligence, and destroy the value of a public record."

§ 753. **Notice of right of way from ordinance.**—A purchaser has notice of the existence of a right of way over land from the fact that the legislature had authorized the opening of a street, the council of the city in which the land was situated had passed an ordinance directing it to be laid out, and a survey had been made by the proper officer, and filed before the purchaser received his deed.<sup>1</sup>

§ 754. **Laying down sidewalk.**—Among the evidences of ownership to be considered in passing upon the question of notice, is the fact that the party claiming title had laid down a sidewalk, and it is immaterial whether the sidewalk is constructed by order of the city or not.<sup>2</sup> It may be that this circumstance alone taken by itself would not be sufficient to create a presumption of notice; it is nevertheless a fact to be taken into consideration. In most of the cases that come before the courts where the question of notice is involved, notice is generally dependent upon a collection of facts which, in the aggregate, are considered sufficient to put a party upon inquiry.

§ 755. **Deed from surviving widow.**—A widow who had qualified under the statute in Texas as the survivor of the community, had sold land belonging to her husband in his lifetime, and the purchaser had paid most of the purchase price. It was held that as against one who derived title through an unrecorded deed made by the husband in his lifetime, but who never gave any notice of his claim, the purchaser from the widow would be protected as an innocent purchaser for value.<sup>3</sup>

§ 756. **Notice of lien.**—It is sufficient to charge a party with notice of all the particulars of a lien to show that he had notice of the lien. If a person takes a deed of land upon which there is a mortgage, of which he had notice, he is affected with all the notice which it is fair to

<sup>1</sup> Bailey v. Miltenberger, 31 Pa. St. 37.

<sup>2</sup> Hatch v. Bigelow, 39 Ill. 546.

<sup>3</sup> Morris v. Meek, 57 Tex. 385.

presume he would obtain in regard to the mortgagee's claim to a lien if he had made inquiry from the mortgagee.<sup>1</sup> A party is not authorized to assume that an encumbrance is already known to him when he hears that land is encumbered.<sup>2</sup>

**§ 757. Exception of encumbrance in covenant.**—Where a deed contains a covenant of warranty, an exception of a mortgage from such covenant, although the mortgage may not be recorded, charges the grantee in the deed with notice. In such case no cause of action can arise against the grantor in favor of the grantee from a foreclosure and sale of the mortgaged property.<sup>3</sup> But where a mortgagor inserts in the mortgage a covenant "to pay and discharge all legal mortgages and encumbrances, of whatever nature and description," on the mortgaged property, a person who acquires title by deed from the mortgagor is not put upon inquiry as to any mortgages or encumbrances not of record. And if the mortgage is not entitled to registration, the grantee would not be charged with constructive notice of it, though it may in fact be spread upon the records.<sup>4</sup>

**§ 758. Deed modified by annexed schedule.**—The general words of conveyance in a deed may be modified by an annexed schedule, and a purchaser takes with notice of the facts stated in such schedule. An owner of land had conveyed certain lots to a person by a deed absolute in form, but intended as security for the pay-

<sup>1</sup> *Martin v. Cauble*, 72 Ind. 67; *Barr v. Kinard*, 3 Strob. 73; *Willink v. Morris Canal & Banking Co.*, 4 N. J. Eq. (3 Green) 377; *George v. Kent*, 7 Allen, 16; *Pike v. Goodnow*, 12 Allen, 472; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Jones v. Williams*, 24 Beav. 47; *Gulf etc. Ry. Co. v. Gill*, 5 Tex. Civ. App. 496; 23 S. W. Rep. 142; *Ijames v. Gaither*, 93 N. O. 358; *Webb v. Robbins*, 77 Ala. 176. See, also, *Simons v. First Nat. Bank*, 93 N. Y. 269; *Wilson v. Vaughan*, 61 Miss. 472. But see *Morris v. Murray*, 82 Ky. 36.

<sup>2</sup> *Jones v. Williams*, 24 Beav. 47.

<sup>3</sup> *Morrison v. Morrison*, 38 Iowa, 73, 80.

<sup>4</sup> *Racouillat v. Rene*, 32 Cal. 450.

ment of certain notes. Subsequently he conveyed all his property, real and personal, without any particular description in the body of the deed, but in a schedule which he annexed to the deed, the land conveyed as security for the payment of the notes was described as: "Lots of ground in Stuart Street, the title to which is in name of David Dunham, given as collateral security to pay certain notes." This deed, absolute in form, but in reality a mortgage, had never been recorded, but the court held that the language of the schedule was notice of its existence to the grantee, and that he could not obtain a priority by the first registration of his deed.<sup>1</sup>

**§ 759. Notice from title deeds not between parties.—** In controversies between grantor and grantee, for the purpose of determining their respective rights, the rule that a grantee is chargeable with constructive notice of circumstances which came to the knowledge of his attorney or agent, for the purchase or in the examination of the title, or that notice of a deed is constructive notice of its contents, does not apply. The rules as to constructive notice are adopted by the courts for the purpose of upholding the prior equitable rights of third parties against subsequent purchasers, who are endeavoring to defeat such prior rights. Therefore, if an owner of land, misapprehending his legal rights, sells the land which had been constructively dedicated for the purposes of a public street, under the terms of the deeds of adjoining lots to prior purchasers, and represents that the lot will not be taken for a street without payment to the grantee of its full value, but does not communicate the facts upon which are founded the rights of the prior purchasers, the grantee, if the lot is in fact worth nothing at the time of the purchase, is entitled to relief against a bond and mortgage given for the purchase money.<sup>2</sup>

<sup>1</sup> *Dunham v. Dey*, 15 Johns. 555; 8 Am. Dec. 282.

<sup>2</sup> *Champlin v. Laytin*, 6 Paige, 189.

## PART II.

## POSSESSION.

§ 760. **Possession as notice.**—It is well established both in England and in this country, that the open, visible, notorious, and exclusive possession of land, is either notice itself of the rights of the party in possession, or is sufficient to put a person upon inquiry as to his rights.<sup>1</sup>

<sup>1</sup> *Haworth v. Taylor*, 108 Ill. 275; *Penny v. Watts*, 1 Macn. & G. 150; *Holmes v. Powell*, 8 De Gex, M. & G. 572; *Hoover v. Redmond*, 15 Bradw. (Ill.) 427; *Taylor v. Stibbert*, 2 Ves. 437; *Allen v. Anthony*, 1 Mer. 282; *Galley v. Ward*, 60 N. H. 331; *Rowe v. Ream*, 105 Pa. St. 543; *Lorl's Appeal*, 105 Pa. St. 451; *Yates v. Hurd*, 8 West C. Rep. 276; *Peasley v. McFadden*, 9 West C. Rep. 715; *Phillips v. Costley*, 40 Ala. 486; *Woods v. Farmere*, 7 Watts, 382; 32 Am. Dec. 772; *Perkins v. Swank*, 43 Miss. 349; *Johnson v. Clark*, 18 Kan. 157; *Barnes v. Union School Township*, 91 Ind. 301; *Strickland v. Kirk*, 51 Miss. 795; *Webber v. Taylor*, 2 Jones Eq. 9; *Preston v. Nash*, 76 Va. 1; *Sears v. Munson*, 23 Iowa, 380; *Rogers v. Jones*, 8 N. H. 264; *Cabeen v. Breckinridge*, 48 Ill. 91; *Truesdale v. Ford*, 37 Ill. 210; *Dunlap v. Wilson*, 32 Ill. 517; *Baynard v. Norris*, 5 Gill, 468; 46 Am. Dec. 647; *Cox v. Prater*, 67 Ga. 588; *Moss v. Atkinson*, 44 Cal. 3; *Killey v. Wilson*, 33 Cal. 690; *Maloney v. Shattuck*, 15 Bradw. (Ill.) 44; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316; *Sailor v. Hertzog*, 4 Whart. 259; *School District v. Taylor*, 19 Kan. 287; *Noyes v. Hall*, 7 Otto, 34; *Loughbridge v. Bowland*, 52 Miss. 546; *McKinzie v. Perrill*, 15 Ohio St. 162; *Diehl v. Page*, 3 N. J. Eq. (2 Green Ch.) 143; *Massey v. Hubbard*, 18 Fla. 688; *Ringold v. Bryan*, 3 Md. Oh. 488; *Hull v. Noble*, 40 Me. 459; *Tankard v. Tankard*, 79 N. C. 54; *Russell v. Swezey*, 22 Mich. 235; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593; *Glidewell v. Spaugh*, 26 Ind. 319; *Edwards v. Thompson*, 71 N. O. 177; *Warren v. Richmond*, 53 Ill. 52; *Keyes v. Test*, 33 Ill. 317; *Reeves v. Ayers*, 38 Ill. 418; *Baldwin v. Johnson*, Saxt. Ch. 441; *Westbrook v. Gleason*, 79 N. Y. 23; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige, 361; *Brown v. Gaffney*, 28 Ill. 149; *Stagg v. Small*, 4 Bradw. (Ill.) 192; *Cowen v. Loomis*, 91 Ill. 132; *Stafford v. Lick*, 7 Cal. 479; *Morrison v. March*, 4 Minn. 422; *Doyle v. Stevens*, 4 Mich. 87; *Havens v. Dale*, 18 Cal. 359; *Groff v. Ramsey*, 19 Minn. 44; *Emmons v. Murray*, 16 N. H. 385; *Woodson v. McCune*, 17 Cal. 298; *Mullins v. Wimberly*, 50 Tex. 457; *Laraway v. Larue*, 63 Iowa, 407; *Laroe v. Gaunt*, 62 Tex. 481; *Moreland v. Richardson*, 24 Beav. 33; *James v. Lichfield*, Law R. 9 Eq. 51; *Wilson v. Hart*, Law R. 1 Ch. App. 463; *Taylor v. Stibbert*, 2 Ves. Jr. 437. And see *Pell v. McElroy*, 36 Cal. 268; *Daubenspeck v. Platt*, 22 Cal. 830; *Bradley v. Snyder*, 14 Ill. 283; 58 Am. Dec. 564; *Watkins v. Edwards*, 23 Tex. 443; *Brown v. Volkening*, 64 N. Y. 76; *Bogue v. Williams*, 48 Ill. 371; *Tunson v. Chamblin*, 88 Ill. 378; *Uhl v. Rau*, 13 Neb. 357; *Cent. R. R. v. McCullough*, 59 Ill. 166; *Warren v. Richmond*, 53 Ill. 52; *Smith v. Gibson*, 15 Minn. 89; *O'Rourke v. O'Connor*,

Where, therefore, a person is in possession of land under an unrecorded agreement with the owner for its purchase, his possession is sufficient notice to put others on inquiry, and if they purchase the land from the owner, the contract of purchase may be enforced against them.<sup>1</sup> "It is the obvious design of our recording laws to protect purchasers from latent legal or equitable titles. Hence, its operation in such cases in giving notice to the world protects all persons against fraud by the grantors wrongfully selling lands a second time. And, as a general rule, when the same person has executed two deeds for the same land, the first deed recorded will hold the title, unless the junior grantee has purchased with notice, in which case a prior recording of his deed would not avail against the prior deed of which he had notice. The statute has only given the priority to the junior deed first recorded, when the grantee has acted in good faith. If, at the time he makes the purchase, he has notice of an elder unrecorded deed, he must be regarded as acting in bad faith, and neither principles of justice nor the policy of the law will permit him to avail of the priority of the record. It then follows that actual, visible, open possession being regarded as notice equal to the recording of the deed under which the grantee is in possession, the person holding the first conveyance, and being in open, visible possession before the junior deed is recorded, must be held to be the owner of the title, as against the grantee in the junior deed."<sup>2</sup> Where an owner of a quarter section of land conveys by deed one acre of the tract to a school district, the school district taking immediate possession of such acre, building a schoolhouse thereon and occupying the same for school

39 Cal. 442; *Dutton v. Warschauer*, 21 Cal. 609; 82 Am. Dec. 765; *Rogers v. Hussey*, 36 Iowa, 664; *Van Kueren v. Cent. R. R. Co.*, 38 N. J. L. (9 Vroom), 165; *Dixon v. Lacoste*, 1 Smedes & M. 107; *Stafford Bank v. Sprague*, 17 Fed. Rep. 784. See *Harral v. Leverty*, 50 Conn. 46; 47 Am. Rep. 608; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285.

<sup>1</sup> *Moss v. Atkinson*, 44 Cal. 3; *Hyde v. Mangan*, 88 Cal. 327, and cases cited.

<sup>2</sup> *Cabeen v. Breckenridge*, 48 Ill. 91, 93, per Walker, J.

purposes, but never recording its deed, and subsequently the grantor mortgages the whole of the quarter section to secure a promissory note, and the mortgage is recorded, and another purchases the note and mortgage before maturity, having previously examined the records and made inquiries of the mortgagor as to the existence of encumbrances, but obtaining no notice concerning them, and having no actual notice of the claims of the school district, still, the possession of the school district is sufficient to cause him to inquire of it or of its agents as to its interests in the property. For a failure to do so the interest of the purchaser of the note and mortgage becomes subordinate to the equities of the school district.<sup>1</sup> Although the land may be incorrectly described in the deed, yet actual possession as against a subsequent purchaser with knowledge, confers title.<sup>2</sup> Where an owner of land conveys it by deed of trust to secure a debt, and a year later executes a contract of purchase, the vendee paying the price and holding possession continuously and notoriously without knowledge of the trust deed, which was not recorded until eight years after its execution; and three years after its registration and eleven years after its execution the land is advertised for sale under the trust deed, the vendee's rights are superior to those of the *cestui que trust* in the trust deed.<sup>3</sup>

§ 761. Possession by grantor—Comments.—Where a grantor remains, after the execution of a deed, in posses-

<sup>1</sup> School District v. Taylor, 19 Kan. 287.

<sup>2</sup> Pike v. Robertson, 79 Mo. 615; White v. White, 105 Ill. 313. And see, also, Warbritton v. Demorett, 129 Ind. 346. But see, where possession was held insufficient, Lanford v. Weeks, 38 Kan. 319; 5 Am. St. Rep. 748.

<sup>3</sup> Preston v. Nash, 76 Va. 1. Where a grantor held title by a deed invalid in equity, and when he was never in possession, and others had controlled the property for many years, when an examination would have disclosed conveyances inconsistent with the full validity of the deed under which the grantor claimed, and when the purchase price was grossly inadequate, a purchaser may be charged with notice of the invalidity of his grantor's deed: Knapp v. Bailey, 79 Me. 195; 1 Am. St. Rep. 295.



sion of the land which he has conveyed, the question of whether his possession under these circumstances is such that a person contemplating a purchase or acquiring some interest in the land is compelled to take notice of the rights of such grantor, which he may have reserved, or which may exist *dehors* his deed, is a question on which the authorities are not agreed. By one class of decisions the rule laid down is that a grantor remaining in possession is entitled to protection to whatever rights he may have by virtue of the notice thereof given by his possession, in the same manner, and to the same extent, that any other person would be. While on the other hand, by another class of decisions, the rule is said to be that a person finding that the one in possession has conveyed away his rights by a deed duly recorded, is not obliged to go further and inquire whether the grantor has not some right or interest not disclosed by the record, and to which his possession may be referred.

§ 762. **View that possession is notice of grantor's rights.**—It is said by the cases holding that his possession is notice, that where the grantor continues in the open and adverse possession of land after the formal execution of a deed, this fact is in conflict with the legal effect of his deed. It is evidence that he still retains some interest in the land which by the record he has absolutely conveyed. A purchaser is put upon inquiry, and is subject to the same rules as would govern if the party in possession was a stranger to the record. Accordingly, where A, an owner of land, conveyed it by deed to B, which was immediately recorded, A not receiving any portion of the purchase money, although the deed recited its payment, and B subsequently conveyed the land to C, but A remained in possession after the execution of his deed, and was in possession at the time B's deed was executed, the latter being insolvent when he executed his conveyance, it was held in an action brought by A to enforce a vendor's lien for the purchase money, that his continued posses-

sion was sufficient to impart notice of his rights.<sup>1</sup> Where A conveyed his farm to B by a deed duly registered, at the same time taking back a conveyance to himself and

<sup>1</sup> *Pell v. McElroy*, 36 Cal. 268; *Illinois Cent. R. R. Co. v. McCullough*, 59 Ill. 166; *Wright v. Bates*, 13 Vt. 341; *Webster v. Maddox*, 6 Me. 256; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *McKecknie v. Hoskins*, 23 Me. 230; *Grimstone v. Carter*, 3 Paige, 421; 24 Am. Dec. 230; *Hopkins v. Garrard*, 7 Mon. B. 312; *Hansen v. Berthelson*, 19 Neb. 433; *Lamoreu v. Meyers*, 68 Wis. 34; 60 Am. Rep. 831; *Stevens v. Castel*, 63 Mich. 111; *Davis v. Demming*, 12 W. Va. 246; *Daubenspeck v. Platt*, 22 Cal. 330; *McLaughlin v. Shepherd*, 32 Me. 143; 52 Am. Dec. 646; *Boggs v. Anderson*, 50 Me. 161; *White v. White*, 89 Ill. 460; *Ford v. Marcall*, 107 Ill. 136; *New v. Wheaton*, 24 Minn. 406; *Turman v. Bell*, 54 Ark. 273; 26 Am. St. Rep. 35. See *Eylar v. Eylar*, 60 Tex. 315. In *Pell v. McElroy*, *supra*, Mr. Justice Sprague, in delivering the opinion of the court, said (p. 273): "The simple, independent fact of possession is sufficient to raise a presumption of interest in the premises on behalf of the occupant. And we can discover no just or rational ground for giving to this fact less significance as notice to a party purchasing the legal title from one not in possession, in consequence of the fact that such occupant had by deed divested himself of the legal title. For instance, should a vendor of lands make an absolute deed which is put of record, and immediately take from the grantee a mortgage upon the same lands to secure a part or all the purchase money, by the terms of which mortgage he is to retain the possession until the entire purchase money is paid, and such vendor and mortgagee should continue in the exclusive possession with his mortgage unrecorded, it is very clear that, under the decisions heretofore referred to, a party purchasing of his vendee while such a possession was in the vendor would take the premises with presumptive notice of the equities of the occupant. So, if a vendor of land make an absolute deed which is put of record, and take a note for the purchase money, and immediately receive from his vendee a reconveyance by absolute deed not put of record, which, by a verbal agreement of the parties, he is to retain, with the possession, as security for the payment of the purchase money, while such possession continued, it manifestly would operate as presumptive notice of his equities to purchasers of his grantees. So, in this case, if before or at the maturity of the note given by McElroy for the purchase money, he (McElroy) had reconveyed the land to Pell in consideration of the surrender of his notes, and then, before Pell had put the deed of record, and while he was still in the exclusive possession with his deed in his pocket, McElroy had sold and conveyed to defendants Kelly and Hearst, it would hardly be contended that they could be protected as purchasers in good faith in a court of equity. An absolute deed divests the grantor not *only* of his legal title, but right of possession; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we cannot appreciate the justice, sound reason, or policy of a rule which would authorize a subse-

two minor sons, the latter deed not being recorded, but A remaining in possession as before, it was held this possession was sufficient to give notice of the second deed.<sup>1</sup> If a vendor of land leaves a deed, after execution, in the hands of the officer taking the acknowledgment, for delivery to a third person, to hold as an escrow until the payment of the purchase money, but the deed, without delivery to the depositary, is placed upon record without the grantor's knowledge or consent, he remaining in possession of the land, a subsequent purchaser from the grantee will hold subject to the equities of the grantor.<sup>2</sup>

**§ 763. Opposite view — Possession not notice of grantor's rights.** — On the other hand, by many authorities, it is held that while possession by a stranger is notice of any claim he may have to the property, a distinction

quent purchaser, while such fact of possession continues, to give controlling prominence to the fact and legal effect of the deed, in utter disregard of the other notorious, prominent, antagonistic fact of exclusive possession in the original grantor. He cannot be regarded a *purchaser in good faith* who negligently or willfully closes his eyes to visible pertinent facts, indicating adverse interest in or encumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case."

<sup>1</sup> Webster v. Maddox, 6 Me. (6 Greenl.) 256; Turman v. Bell, 54 Ark. 273; 26 Am. St. Rep. 35. Creditors of the grantee are bound as effectually by notice afforded by possession of the grantor as they are by possession by a stranger to the title: Groff v. State Bank, 50 Minn. 234; 36 Am. St. Rep. 640; citing secs. 761-765 of text.

<sup>2</sup> Illinois Central R. R. Co. v. McCullough, 59 Ill. 166. In Grimstone v. Carter, 3 Paige, 421, 439; 24 Am. Dec. 230, the Chancellor says: "This is undoubtedly a hard case for the purchasers who supposed they were getting a good title. But as the complainant was not aware of the negotiation for the purchase of the property, and therefore had no opportunity to apprise them of his equitable claim to a reconveyance of the north half of the lot, it would be equally hard to deprive him of his property without consideration. Seymour and Welles were informed he was in possession, which, by the settled law of the land, was sufficient to put them on inquiry, and to deprive them of the defense of *bona fide* purchasers without notice of his rights. And they, in the language of Lord Eldon, having neglected to take the obvious precaution of inquiring as to the nature and extent of a tenant's interest in the property, must suffer the consequences of their neglect."

is to be noted between that case and the case of a grantor remaining in possession after the execution of a deed. In a case in New Jersey, the court while admitting the full force of the general rule as to the effect of notice given by possession, declares that "this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive upon that subject; having declared, by his conveyance, that he makes no reservation, he is estopped from setting up any secret arrangement by which his grant is impaired. The well-settled rule applies to this case, that a party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey."<sup>1</sup> In a case in Michigan, Mr. Justice Christiancy, in delivering the opinion of the court, after adverting to the fact that open and peaceable possession is notice to the world of the claim under which the party in possession holds, thus continues: "But the object of the law in holding such possession constructive notice, where it has been so held, is to protect the possessor from the acts of others who do not derive their title from him; not to protect him against *his own acts*, and especially against his own deed. If a party executes and delivers to another a solemn deed of conveyance of the land itself, and suffers that deed to go upon record, he says to all the world, 'whatever right I have, or may have claimed to have in this land, I have conveyed to my grantee; and though I am yet in possession, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance to my grantee.' This is the natural inference to be drawn from the recorded deed, and in the minds of all men, would be calculated to dispense with the necessity of further inquiry upon the point. All presumption of right or claim of right is

<sup>1</sup> Van Keuren v. Central R. R. Co. of New Jersey, 38 N. J. L. (9 Vroom) 165, 167, per Van Syckel, J.

rebutted by his own act and deed. One of the main objects of the registry law would be defeated by any other rule."<sup>1</sup>

§ 764. **Comments.**—It is perhaps to be regretted that courts should hold parties bound by any other notice than that furnished by the record. Land is sold in many instances that the party purchasing has never seen. The purchaser relies upon the records for the purpose of ascertaining his vendor's title, and generally considers himself safe in purchasing when the records show that his vendor's title is indefeasible. But it may happen that the one apparently possessing the title has no title whatever, or has a title subject to liens and encumbrances not disclosed by the record, but manifested by a possession sufficient to affect subsequent purchasers with notice. Inasmuch as our law allows possession to have the effect of notice, there seems to us no good reason for drawing a distinction between cases where a stranger to the title has possession, and where the grantor remains in possession after the execution of his deed, under some title or claim not shown by the records. The possession in

<sup>1</sup> *Bloomer v. Henderson*, 8 Mich. 395, 405; 77 Am. Dec. 453, and cases cited. See, also, *Woods v. Farmer*, 7 Watts, 382; 32 Am. Dec. 772; *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 508; *Newhall v. Pierce*, 5 Pick. 450; *Rice v. Rice*, 2 Drew. 1; *White v. Wakefield*, 7 Sim. 401; *Muir v. Jolly*, 26 Beav. 143; *Groton Sav. Bank v. Beatty*, 30 N. J. Eq. 133; *Quick v. Milligan*, 108 Ind. 419; 58 Am. Rep. 49; *Eylar v. Eylar*, 60 Tex. 319; *Hoffman v. Blume*, 64 Tex. 334; *Koon v. Trammel*, 71 Iowa, 132; *Abbott v. Gregory*, 39 Mich. 68; *Humphrey v. Hurd*, 29 Mich. 44; *May v. Sturdivant*, 75 Iowa, 116; 39 Mo. Rep. 221; 9 Am. St. Rep. 463; *Crassen v. Swoveland*, 22 Ind. 427; *Sprague v. White*, 73 Iowa, 670; 35 N. W. Rep. 751; *Dodge v. Davis*, 85 Iowa, 77; 52 N. W. Rep. 2; *Tuttle v. Churchman*, 74 Ind. 311; *Bell v. Twilight*, 18 N. H. 159; 45 Am. Dec. 367; *Mateskey v. Feldman*, 75 Wis. 103; 43 N. W. Rep. 703; *Schwallback v. Milwaukee etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740; *Denton v. White*, 26 Wis. 769; *Hurt v. Cooper*, 63 Tex. 362; *Love v. Breedlove*, 75 Tex. 649; 13 S. W. Rep. 222; *Hafters v. Strange*, 65 Miss. 323; 7 Am. St. Rep. 659; *Seymour v. McKinstrey*, 106 N. Y. 230; *Burt v. Baldwin*, 8 Neb. 487; *Van Keuren v. Central R. R. Co.*, 38 N. J. L. 165. And see *New York Life Ins. Co. v. Cutler*, 3 Sand. Ch. 176; *Cook v. Travis*, 20 N. Y. 400; *Reed v. Gannon*, 50 N. Y. 345; *Dawson v. Danbury Bank*, 15 Mich. 489.

either case is the same. In either case, it is a fact in conflict with the record title. If possession by a stranger is sufficient to make it obligatory upon purchasers to ascertain his rights, a possession by the grantor himself, after the execution of his deed, is a circumstance as much entitled to consideration, and as apt to cause inquiry. This much may be admitted. But it is said that the grantor is estopped by the execution of his deed. We cannot see why the doctrine of estoppel does not apply with as much force to one case as to the other. A stranger who neglects to have recorded the instrument under which he claims title or right is as guilty of negligence as a grantor who fails to record the instrument by which his rights are conferred or secured. The grantor is not seeking to *defeat* his deed. He, of course, is estopped from assailing his own deed. But, when he remains in possession, he claims some right *dehors* his deed. It is true that, in many instances, that right could have been reserved in his deed. But it is true in all instances that his rights either could have been conferred, if they are not, by a separate instrument. In a case where an owner of land conveys it by deed which is recorded, and takes a mortgage as security for the payment of the purchase money, or takes an absolute deed intended as a mortgage, which, by the agreement of the parties or the grantor's neglect, is not recorded, and it is agreed that the grantor is to remain in possession until the purchase money is paid, the question of the grantor's estoppel by his deed, it seems to us, is not involved. The grantor admits the execution of his deed, and concedes that it is as operative in all respects as it purports to be. But he has the same right as anyone else to acquire, subsequently, either a legal or an equitable title from his grantee. If he does so, and does not put the instrument giving such title on record, he occupies exactly the same position as a purchaser who acquires a title by deed which he fails to record. The negligence in one case is as great as in the other. Neither is attempting to defeat any recorded deed. There is no

question of estoppel, because the full effect of the recorded conveyances is conceded. It seems to us that, in these cases, the effect of a possession by a stranger and by a grantor ought to be similar. In either case, the record shows that the title is vested in one other than the party in possession. In either case, the possession is visible; is of a character of which one viewing the premises must be cognizant. In either case, the possession may be under permission of the owner as he appears of record, without any right being held by the party in possession, or, in either case, the party in possession may claim under an adverse title. If possession is protection to one, it should be to the other. Whatever can be said as to the danger of allowing a grantor, who remains in possession after the execution of his deed, to claim a title in conflict with the record title, can be said with equal force against allowing possession by anyone, under any circumstances, to affect subsequent purchasers and encumbrancers with notice.<sup>1</sup>

**§ 765. Absolute deed and grantor's possession under unrecorded defeasance.**—It is held in accordance with the view that a grantor's possession affords notice of his rights, that where a person conveys land by a deed absolute in form, which is recorded, taking back a defeasance which is not recorded, constituting the transaction a mortgage, the possession and actual occupation of the land by the mortgagor are notice of his title to a purchaser from the mortgagee.<sup>2</sup> But in Indiana, it is held on the other hand that such possession is not notice of an unrecorded defeasance,<sup>3</sup> and decisions in Massachusetts are to the same effect.<sup>4</sup> As already stated, we are of opinion that the grantor

<sup>1</sup> In *Groff v. State Bank*, 50 Minn. 234, 36 Am. St. Rep. 640, §§ 761–765, were cited as authority for the views expressed by the court.

<sup>2</sup> *Daubenspeck v. Platt*, 22 Cal. 330; *Pell v. McElroy*, 36 Cal. 668; *New v. Wheaton*, 24 Minn. 406.

<sup>3</sup> *Crassen v. Swoveland*, 22 Ind. 427.

<sup>4</sup> *Hennessy v. Andrews*, 6 Cush. 170; *Newhall v. Pierce*, 5 Pick. 450; *Newhall v. Burt*, 7 Pick. 156. And see *Kunkle v. Wolfersberger*, 6 Watts, 126; *Corpman v. Baccastow*, 84 Pa. St. 363; *Brophy Mining Co. v. Brophy*



should be as much entitled to claim the benefit of notice arising from his open possession as anyone else. It has been held in New York, that where a judgment debtor continues in possession of the land which has been sold under execution against him, his possession, it may be presumed, is under the title of the purchaser.<sup>1</sup> "It is quite true, generally," said Comstock, J., "that the law regards the actual occupancy of land as equivalent to notice to all persons dealing with the title, of the claims of the occupant. But this is not an absolute proposition which is to be taken as true in all possible relations. The circumstances known may be such that the occupancy will not suggest to a purchaser an inquiry into the title or claim under which it may be held; and when the inquiry may be omitted in good faith, and the exercise of ordinary prudence, no one is bound to make it. Possession out of the vendor and actually in another person, only suggests an inquiry into the claim of the latter. Ordinarily, that inquiry should be made, because it evinces bad faith or gross neglect not to make it. But the question in such cases is one of actual notice, and such notice will be imputed to a purchaser only where it is a reasonable and just inference from the visible facts. He cannot willfully close his eyes and then allege good faith; nor can he pause in the examination where the facts made known to him plainly suggest a further inquiry to be pursued. The adjudged cases which have been the most carefully considered do not carry the doctrine of notice as implied or inferred from circumstances further than is here indicated."<sup>2</sup> Possession of mortgaged premises is notice of the equities of the occupant to a person who purchases the same at a trustee's sale under a power of sale. Under these circumstances, the

& Dale G. & S. Co., 15 Nev. 101; *Parker v. Osgood*, 3 Allen, 487; *Lamb v. Pierce*, 113 Mass. 73; *Pomroy v. Stevens*, 11 Met. 244; *Mara v. Pierce*, 9 Gray, 306; *Dooley v. Wolcott*, 4 Allen, 407; *Groton Savings Bank v. Batty*, 20 N. J. Eq. (3 Stewt.) 126.

<sup>1</sup> *Cook v. Travis*, 20 N. Y. 400.

<sup>2</sup> *Cook v. Travis*, 20 N. Y. 402, 403.

purchaser at the trustee's sale will acquire a title subject to any equitable rights of the party in possession to avoid the sale.<sup>1</sup> Where a mortgagor continues in possession after a foreclosure sale, it is held in Michigan that his possession is not constructive notice of any title or interest subsequently acquired by him not appearing of record.<sup>2</sup> If two persons buy a tract of land, each being equally interested and each taking his part of the land, a decree, if no unfairness in the division is shown, may be entered after the death of one of the parties confirming such partition.<sup>3</sup>

**§ 766. Parol evidence to show grantor's right to possession.**—Notwithstanding the general proposition that a reservation of an interest in real estate can be made only by deed, yet in an action for use and occupation, parol evidence is admissible to show an agreement between the parties, that the grantor might continue to use the premises.<sup>4</sup> The effect of such evidence is not to contradict the deed, but to explain what was the actual consideration, and parol evidence for this purpose is admissible.<sup>5</sup>

**§ 767. Absolute deed with mortgage for support.**—A husband and wife who had been for several years in the occupation of a farm, conveyed it to their son and took back from him a mortgage conditioned for their support. They omitted, however, to have the mortgage recorded. The mortgagees continued in the possession of the farm, they and the son forming one family, and all aiding in and contributing to its support. The son, some years after the execution of this mortgage, executed another to a third person. The latter instrument was properly recorded. Under these circumstances, the court held that the second mortgagee must be considered as having

<sup>1</sup> *Olevinger v. Ross*, 109 Ill. 349.

<sup>2</sup> *Dawson v. Danbury Bank*, 15 Mich. 489.

<sup>3</sup> *Irwin v. Dyke*, 109 Ill. 528.

<sup>4</sup> *The Aull Savings Bank v. Aull*, 80 Mo. 199.

<sup>5</sup> *The Aull Savings Bank v. Aull*, 80 Mo. 199.

the rights of the first mortgagees.<sup>1</sup> Where an aged woman executed a deed to her daughter, reciting as the consideration "five dollars and the faithful performance of a certain agreement," the agreement being by parol that the daughter should support the mother for her life, and the daughter subsequently married, and on the same consideration conveyed the land to her husband, to whom the mother afterward executed a quitclaim deed for the purpose, as the deed expressed, of correcting a misnomer, and the husband then mortgaged the land to a person who had knowledge of the quitclaim deed, it was held that the mortgagee was affected with notice of the agreement, which might have been ascertained by inquiry.<sup>2</sup> But it is said that possession by husband and wife together will impart notice of her equities as against all persons not claiming under the husband.<sup>3</sup>

**§ 768. Residence of husband and wife.** — A purchaser is not put upon inquiry, it is held, to ascertain the rights of a third person, from whom the husband took a lease of land to which his wife held the record title, when the existence of such lease is unknown to the purchaser.<sup>4</sup> Nor is notice of any claim of interest in the land by the wife given by the fact that the husband and wife jointly reside on the land.<sup>5</sup>

<sup>1</sup> *Boggs v. Anderson*, 50 Me. 161. See *Harrison v. New Jersey etc. Transportation Co.*, 19 N. J. Eq. (4 Green, C. E.) 488.

<sup>2</sup> *Dailey v. Kastell*, 56 Wis. 444.

<sup>3</sup> *Iowa Loan & Trust Co. v. King*, 58 Iowa, 598.

<sup>4</sup> *Fassett v. Smith*, 23 N. Y. 252.

<sup>5</sup> *Neal v. Perkerson*, 61 Ga. 345. But see *Brunson v. Brooks*, 68 Ala. 248. A person in Utah occupied certain premises with his wife and A, a polygamous wife, who remained with him under a secret agreement that she should have a half interest in the property, and he received a deed for the land, without making known his agreement with A. Subsequently third parties acquired his interest, paying a valuable consideration and having no notice of A's equities. As against these parties it was held that A had no claim. The occupation of the premises by her in the manner stated gave no constructive notice of her rights: *Townsend v. Little*, 109 U. S. 500.

§ 769. **Character of possession.**—The possession to have the effect of notice must be of that character that the attention of a purchaser is at once called to it. It must be open, distinct, exclusive, and unequivocal. If the land is used by the grantee and others for pasture, and there are no buildings upon it, such possession is not of that visible, notorious, and exclusive character as amounts to constructive notice of ownership.<sup>1</sup> If wood is occasionally cut under circumstances which might be regarded as so many trespasses with as much probability as acts of ownership, such fact does not make the possession notice.<sup>2</sup> “The character of the possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open, and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record.”<sup>3</sup> An

<sup>1</sup> *Coleman v. Barklew*, 3 Dutch. 357, and cases cited; *Taylor v. Central Pac. R. R. Co.*, 8 West O. Rep. 22; 67 Cal. 615.

<sup>2</sup> *Holmes v. Stout*, 2 Stockt. Ch. (10 N. J.) 419.

<sup>3</sup> *Brown v. Volkening*, 64 N. Y. 76, 82, per Allen, J; *Elliott v. Lane*, 82 Iowa, 484; 31 Am. St. Rep. 504; *Thomas v. Kennedy*, 24 Iowa, 397; 95 Am. Dec. 740; *Iowa Loan and Trust Co. v. King*, 58 Iowa, 598; *Lindley v. Martindale*, 78 Iowa, 380; *Kendall v. Lawrence*, 22 Pick. 540; *McMechan v. Griffing*, 3 Pick. 149; 15 Am. Dec. 198; *Webster v. Van Steenbergh*, 46 Barb. 211; *Pope v. Allen*, 90 N. Y. 298; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306; *Page v. Waring*, 76 N. Y. 463; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436; *Betts v. Letcher*, 1 S. D. 182; 46 N. W. Rep. 193; *Beaubrien v. Henderson*, 38 Kan. 471; 16 Pac. Rep. 796; *Trezise v. Lacy*, 22 Kan. 472; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Noyes v. Hall*, 97 U. S. 34; *Townsend v. Little*, 109 U. S. 504; *Gum v. Equitable Trust Co.*, 1 McCrary, 51; *McLean v. Clapp*, 141 U. S. 429; *Webber v. Taylor*, 2 Jones Eq. 9; *Tankard v. Tankard*, 79 N. C. 54; *Dutton v. Warschauer*, 21 Cal. 609; 82 Am. Dec. 765; *Fair v. Stevenot*, 29 Cal. 486; *Smith v. Yule*, 31 Cal. 180; 89 Am. Dec. 167; *Blankenship v. Douglas*, 26 Tex. 225; 82 Am. Dec. 608; *Satterwhite v. Rosser*, 61 Tex. 166; *Bernstein v. Humes*, 71 Ala. 260; *Truesdale v. Ford*, 37 Ill. 210; *Bogue v. Williams*, 48 Ill. 371; *Smith v. Jackson*, 76 Ill. 254; *Partridge v. Chapman*, 81 Ill. 137; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628; 32 N. E. Rep. 291;

owner of the equitable title to sixty acres of land, of which three-quarters of an acre had been cleared and fenced, placed a person upon the tract who resided on an adjoining tract. The land was situated in a densely timbered and thinly inhabited country. The person left in charge of the land chopped wood upon and cultivated the part which had been cleared. Among the neighbors the general understanding was that the land belonged to the person having the equitable title to it. It was held by a majority of the court that one who took a mortgage from the holder of the legal title, took by reason of this possession with notice of the rights of the equitable owner.<sup>1</sup> While there may be some difference of opinion

*Davis v. Hopkins*, 15 Ill. 519; *Mason v. Mullahy*, 145 Ill. 383; 34 N. E. Rep. 36; *Western Min. Co. v. Peytona Coal Co.*, 8 W. Va. 406; *Core v. Faupel*, 24 W. Va. 238; *Martin v. Jackson*, 27 Pa. St. 504; 67 Am. Dec. 489; *Boyce v. McCulloch*, 3 W. & S. 429; 39 Am. Dec. 35; *Meehan v. Williams*, 48 Pa. St. 238; *Jeffersonville M. & T. R. Co. v. Oyler*, 82 Ind. 394; *Hawes v. Wiswell*, 8 Me. 94; *Butler v. Stevens*, 26 Me. 484; *Bell v. Twilight*, 22 N. H. 500; *Patten v. Moore*, 32 N. H. 382; *Ellis v. Young*, 31 S. O. 322; 9 S. E. Rep. 955; *Williams v. Sprigg*, 6 Ohio St. 585; *Rauney v. Hardy*, 43 Ohio St. 157; 1 N. E. Rep. 523; *Brophy Min. Co. v. Brophy and Dale G. & S. Min. Co.*, 15 Nev. 101; *McKee v. Wilcox*, 11 Mich. 358; 83 Am. Dec. 743; *Smith v. Greenop*, 60 Mich. 61; 26 N. W. Rep. 832.

<sup>1</sup> *Wickes v. Lake*, 25 Wis. 71. A very able dissenting opinion was filed by Dixon, O. J. In the opinion of the court, delivered by Cole, J., it was said: "For what more notorious, open, visible, and unambiguous acts of possession and ownership can be manifested over real estate, than by chopping, clearing up, fencing, and actually cultivating between two and three acres of heavily timbered land? True, the number of acres is not large, yet it will cost as much time, labor, and money to chop and clear up three acres of heavily timbered land, and make it fit for cultivation, as it will to make large improvements on the prairie. The possession and cultivation of a large inclosed field on the prairie, by raising wheat upon it, would not naturally be more observed by the public, or create a stronger presumption of notice, than such an improvement in the woods. And it is very plain that such unambiguous acts of ownership over land will never be confounded with mere acts of trespass. They are not liable to any such misconstruction. Considering the condition of the country, that it was sparsely settled and but a little cleared up, the clearing, fencing, and cultivating one, two, or three acres are such decided acts of ownership as will not fail to attract the notice of the public, as it seems they did in this case. and are of such a character as to be notice to a purchaser. Such improvements under the circumstances are open, visible, notorious, and unam-

upon the question of fact as to whether possession in any given case has been open, visible, notorious, and exclusive, yet that a possession of this kind, as a matter of law, is required, cannot be questioned.<sup>1</sup>

**§ 770. Possession under one kind of right as notice of other rights.**—It is declared by one class of cases that where possession of land is acquired under one kind of right, such possession is not notice of another interest which the occupant has acquired subsequently, in the absence of peculiar circumstances of sufficient consequence to attract attention to the change of the former title or

biguous, and are as striking evidence of the continued and complete possession of the land by the party who makes them, as can well be imagined. For we do not understand the rule to be, that a person must actually reside upon the land to make his possession notice. He may actually improve and cultivate it, and perform decided acts of ownership over it, without residing upon it. He may cultivate and improve it by a tenant; for the possession of the tenant is his possession. But here there were actual, visible, and substantial improvements made, which would cost considerable labor and money to make them; land was cleared up, fenced, and cultivated, and the occupation and possession were as notorious and exclusive as could have existed, unless Lake and Palmer had actually resided upon their several tracts." See, also, *Krider v. Lafferty*, 1 Whart. 303, where planting ground with willows to obtain materials to carry on the trade of basket making was held sufficient possession. And see, also, *Banner v. Ward*, 12 Fed. Rep. 820.

<sup>1</sup> *Pope v. Allen*, 90 N. Y. 298; *Webber v. Taylor*, 2 Jones Eq. 9; *Williams v. Sprigg*, 6 Ohio St. 585; *Butler v. Stevens*, 26 Me. 484; *Tankard v. Tankard*, 79 N. C. 54; *Patten v. Moore*, 32 N. H. 382; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436; *Cabeen v. Breckenridge*, 48 Ill. 91; *Holmes v. Powell*, 8 De Gex, M. & G. 572; *Jefferson etc. R. R. Co. v. Oyler*, 82 Ind. 394; *Gum v. Equitable Trust Co.*, 1 McOrary, 51; *Trezise v. Lacy*, 22 Kan. 742; *Truesdale v. Ford*, 37 Ill. 210; *Noyes v. Hall*, 7 Otto, 34; *Taylor v. Kelly*, 3 Jones Eq. 240; *Dunlap v. Wilson*, 32 Ill. 517; *Bradley v. Snyder*, 14 Ill. 263; 58 Am. Dec. 564; *Bogue v. Williams*, 48 Ill. 371; *Troy City Bank v. Wilcox*, 24 Wis. 671; *Martin v. Jackson*, 3 Casey, 504; 67 Am. Dec. 489; *Bell v. Twilight*, 22 N. H. 500; *Wright v. Wood*, 11 Harris, 120; *Meehan v. Williams*, 12 Wright, 238; *Webster v. Van Steenberg*, 46 Barb. 211; *Brophy Mining Co. v. Brophy G. & S. M. Co.*, 15 Nev. 101; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306. See, also, *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71; *Worcester v. Lord*, 56 Me. 265; 96 Am. Dec. 456; *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740; *White v. White*, 105 Ill. 313; *Pope v. Allen*, 90 N. Y. 298; *Beaubrien v. Henderson*, 38 Kan. 471; *Parker v. Baines*, 65 Tex. 605.

interest.<sup>1</sup> In one of these cases, although the decision was based on another point, Mr. Justice Wilde said: "I admit that generally the open and notorious possession of the first purchaser under his deed would be sufficient to raise a legal presumption of notice. But suppose that a lessor should grant the fee of the land to the lessee, he being in possession under the lease, and the next day should make a second grant to a third person who well knew that the lessee the day before was in possession under the lease, how does his continued possession furnish evidence of notice of his purchase? To imply notice in such case is to presume a fact, without proof and against probability."<sup>2</sup> Where an owner of a vacant, unimproved town lot, uses in common with his tenants of adjoining premises, such lot as a yard in which to hang out and dry clothes, such use and possession will not prevail as constructive notice against an interest acquired by a purchaser or mortgagee in good faith without actual notice.<sup>3</sup> But the proper rule seems to be that possession

<sup>1</sup> *Williams v. Sprigg*, 6 Ohio St. 585; *McMechan v. Griffing*, 3 Pick. 149, 154; 15 Am. Dec. 198; *Lincoln v. Thompson*, 75 Mo. 613; *Bush v. Golden*, 17 Conn. 594; *Kendall v. Lawrence*, 22 Pick. 540. See *Matthews v. Demeritt*, 22 Me. 312.

<sup>2</sup> In *McMechan v. Griffing*, 3 Pick. 149, 155; 15 Am. Dec. 198.

<sup>3</sup> *Williams v. Sprigg*, 6 Ohio St. 585. In delivering the opinion of the Court, Bowen, J., said (p. 594): "The complainant owned the hotel which occupied the front of two lots. Lot No. 311 adjoined them. It was vacant, and had during the construction of the hotel become a sort of lumberyard, on which building and other materials had accumulated. In the spring of 1837, the complainant buys the lot in order to enhance the comfort and convenience of his hotel. He removes some of the lumber and rubbish therefrom, but does nothing more. He does not build upon it; he does not fence it; but his tenant of the other lots and hotel hangs out clothes there to dry after being washed. This is the extent to the possession held and exercised by complainant during the season of 1837. No lease was made to Segur, the tenant of the hotel, for it, no rent paid for it, no acts of ownership by him exercised over it. Complainant was seen once, as witness thinks, removing some of the materials from it. Should such acts of possession and control be held to give notice to purchasers of equities and equitable titles not otherwise communicated or made known to them? We think the rule has never been, and should never be, carried so far. There must be something in the acts which accompany possession of property, in order to give construct-



should be held to be notice of all the rights of the party in possession, where that possession is open, visible, exclusive, distinct, and unequivocal.<sup>1</sup>

§ 771. **Sign of real estate agent.**—Where the agent of a party claiming title to real estate put upon the premises a board on which was printed a notice that the land was for sale by the agent, and giving the agent's address, it was held that this was sufficient notice of the owner's rights as upon inquiry of the agent, and one could ascertain the extent and character of title.<sup>2</sup>

§ 772. **Possession by church.**—A possession of a church or a meetinghouse by its officers for the ordinary

ive notice, which can be seen and understood, something that will induce inquiry, that will naturally raise the question as to who may have rights there. Living on the premises, raising crops on them, the employment of persons there in the making of improvements, accompanied by frequent acts and expressions of ownership, would produce such notoriety, undoubtedly, as should put purchasers upon their guard, and induce investigation to acquire knowledge sufficient to enable them to deal safely. This may not be the only means of conveying notice to strangers, and without intending to define exactly what, in all cases, will constitute constructive notice, we feel no hesitation in saying that the stretching of a clothesline over a vacant, adjoining town lot, by the tenant of other premises, on which to hang clothes to dry, or a casual act of removing stone, brick, or lumber therefrom, belonging to an owner who had placed them there while constructing a house on the next lot, would not charge a *bona fide* purchaser or mortgagee with notice of equities in the landlord of such tenant, or the owner who removed such materials. Something more is required."

<sup>1</sup> See *Rogers v. Jones*, 8 N. H. 264; *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526; *McKecknie v. Hoskins*, 23 Me. 230; *Woods v. Farmere*, 7 Watts, 382; 32 Am. Dec. 772; *Bailey v. Richardson*, 9 Hare, 734; *Allen v. Anthony*, 1 Mer. 282; *Powell v. Dillon*, 2 Ball. & B. 416; *Barnhart v. Greenshields*, 9 Moore C. P. 33; *Hanbury v. Litchfield*, 2 Mylne & K. 629; *Taylor v. Stibbert*, 2 Ves. 437; *Daniels v. Davidson*, 16 Ves. 249; *Crofton v. Ormsby*, 2 Schoales & L. 583; *Moreland v. Richardson*, 24 Beav. 33; *Wilbraham v. Livesey*, 18 Beav. 206; *Lewis v. Bond*, 18 Beav. 85; *Jones v. Smith*, 1 Hare, 48.

<sup>2</sup> *Hatch v. Bigelow*, 39 Ill. 546. On this point the court said: "The board erected was placed on the lot by Kerfoot, as the agent of Lushbaugh, after the purchase by the latter. It is, therefore, to be regarded as placed there by Lushbaugh, and as if it had referred persons desiring to purchase to himself."

purposes of worship is a sufficient possession to put a purchaser upon inquiry. A possession of this character is just as effectual for giving notice as if a dwelling-house had been erected upon the land, and it was actually inhabited.<sup>1</sup> So the possession of rooms by a lodge under a lease is sufficient to charge a purchaser with notice, nor is he relieved from the duty of inquiry by the fact that the doors of the rooms were locked when he looked at the house and he was not aware of their occupation.<sup>2</sup>

§ 773. **Possession distinct.**—The possession must be distinct and unequivocal. Where the grantee bought by parol a corner of the grantor's tract, went into possession and erected buildings, but did not reduce the part purchased by him by survey or other means to certainty, and on the part of the tract retained by the grantor a forge, dwelling-house, grist and saw mill, and buildings for the workmen were situated, so that the buildings of the grantee, with those of the grantor, might appear to an observer as one establishment, it was held that the grantee's possession was not sufficient to charge persons with notice.<sup>3</sup> "At best," said Yeates, J., "the possession of the defendant was of a mixed nature. His pretensions were not defined by marked boundaries or an actual survey. If one inclining to purchase had previously viewed the premises, he would have seen nothing but what usually occurs where forges, grist, and saw mills are carried on, outhouses and cabins for the accommodation of colliers and other workmen. Without such conveniences, those manufactories could not be carried on. The defendant's holding under such circumstances could not convey the same information, nor put a purchaser upon inquiry in the same manner, as an exclusive, unmixed possession in common cases might reasonably seem to

<sup>1</sup> *Randolph v. Meeks*, Mart. & Y. 58; *Macon v. Sheppard*, 2 Humph. 835.

<sup>2</sup> *Scheerer v. Cuddy*, 85 Cal. 270.

<sup>3</sup> *Billington v. Welsh*, 5 Binn. 129; 6 Am. Dec. 406; *Pope v. Allen*, 90 N. Y. 298.

give.”<sup>1</sup> A third person is not chargeable with constructive notice of an unrecorded deed, where the grantor and grantee were in joint possession of the land at the time of the execution of the deed, and there was no change in possession afterward.<sup>2</sup> In a word, the possession must be actual, visible, and open. It must not be equivocal or consistent with the title shown by the record.<sup>3</sup>

§ 774. **Possession continuous.**—The party who claims that his possession was notice to a subsequent purchaser, must show that the possession was continuous. A purchaser is not compelled to inquire of a late occupier of land as to the nature of his title.<sup>4</sup> Where a purchaser at a foreclosure sale ousts the tenant of a purchaser from the premises under an unrecorded deed and takes possession himself, the prior possession is not notice of title to subsequent purchasers from the grantee in the sheriff's deed on the foreclosure sale.<sup>5</sup> “It must be occupancy, something more than successive and occasional entries on the land. All the authorities agree that possession is not notice, except during its continuance, and that even when his vendor is out of possession, a vendee is not bound to take notice of the antecedent possession of third persons. A purchaser is bound to inquire only of those on the land at the time of his purchase. The authorities

<sup>1</sup> In *Billington v. Welsh*, 5 Binn. 135; 8 Am. Dec. 406. See, also, *Hanrick v. Thompson*, 9 Ala. 409.

<sup>2</sup> *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418. Where a deed not recorded was executed by a person to his mother in law, both residing on the farm after the execution of the deed as before, the grantor exercising authority to some extent over the farm and the business of farming, and the grantee residing with him as a member of his family, the possession of the grantee is not sufficient to impart notice, notwithstanding she may have managed the business of the farm, it not being shown, however, that she had exclusive control: *Elliott v. Lane*, 82 Iowa, 484; 31 Am. St. Rep. 504.

<sup>3</sup> *Pope v. Allen*, 90 N. Y. 298.

<sup>4</sup> *Campbell v. Brackenridge*, 8 Blackf. 471; *Ehle v. Brown*, 31 Wis. 405. See *Brown v. Volkening*, 64 N. Y. 76; *Hewes v. Wiswell*, 8 Me. 94.

<sup>5</sup> *Ehle v. Brown*, 31 Wis. 405. See, also, *Hewes v. Wiswell*, 8 Me. 94; *Hiller v. Jones*, 66 Miss. 636; 6 So. Rep. 645.

are equally clear that to be effective, as notice, possession even at the time of the sale must be distinct and unequivocal. It is even said in some of the cases, that it must be actual, and of such a nature as would suffice to constitute a disseisin or adverse possession.”<sup>1</sup>

§ 775. **Tenant's possession as notice of landlord's title.**—On the question of whether a possession by a tenant is notice of the title of the landlord, the authorities are divided. It is held, by what we consider the weight of authority, that the possession of a party makes it obligatory upon a purchaser to inquire as to the rights under which such possession is taken and held, and charges such purchaser with notice of all the facts which he might ascertain by prosecuting such inquiry, and hence such possession by a tenant is notice of the lessor's title.<sup>2</sup> “A person who purchases an estate in the possession of another than his vendor, is, in equity, that is, in good faith, bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry, which ordinary good faith requires of him, equity charges him with notice of all the facts that such inquiry would disclose. Suppose the possessor is a tenant holding un-

<sup>1</sup> *Meehan v. Williams*, 48 Pa. St. 238, 240, per Strong, J., and cases cited. And see as to rule in England, *Knight v. Bowyer*, 2 De Gex & J. 421; 23 Beav. 609; *Jones v. Smith*, 1 Hare, 43; *Miles v. Langley*, 1 Russ. & M. 39; *Holmes v. Powell*, 8 De Gex, M. & G. 572; *Feilden v. Slater*, Law R. 7 Eq. 523; *Wilson v. Hart*, Law R. 1 Ch. 463; *Parker v. Whyte*, 1 Hem. & M. 167; *Clements v. Welles*, Law R. 1 Eq. 200; 35 Beav. 513.

<sup>2</sup> *Cunningham v. Pattee*, 99 Mass. 248; *Conlee v. McDowell*, 15 Neb. 184; *Edwards v. Thompson*, 71 N. C. 177; *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526; *O'Rourke v. O'Connor*, 39 Cal. 442; *Dickey v. Lyon*, 19 Iowa, 544; *Sailor v. Hertzog*, 4 Whart. 259; *Thompson v. Pioche*, 44 Cal. 508; *Pittman v. Gaty*, 5 Gilm. 186; *Nelson v. Wade*, 21 Iowa, 49; *Sergeant v. Ingersoll*, 15 Pa. St. 343; *Morrison v. March*, 4 Minn. 422; *The Bank v. Flagg*, 3 Barb. Ch. 316; *Hood v. Fahnestock*, 1 Barr. 470; 44 Am. Dec. 147; *The Bank v. Godfrey*, 23 Ill. 579; *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526; *Wright v. Wood*, 23 Pa. St. 120; *Bowman v. Anderson*, 82 Iowa, 210; 31 Am. St. Rep. 473; *Phillips v. Blair*, 38 Iowa, 649; *Glendenning v. Bell*, 70 Tex. 633; *Woodson v. Collins*, 56 Tex. 175; *Taylor v. Moseley*, 57 Miss. 544; *Liebrick v. Stahle*, 68 Iowa, 515; *Peaseley v. McFadden*, 68 Cal. 611.

der a lease, an inquiry of such tenant would advise the purchaser, not only of the length of time and terms of tenancy, but also of the landlord, and hence that some other person than his proposed vendor claimed a right to the estate, and was holding possession thereof by his tenant. Being thus advised, equity in vindication of ordinary good faith, requires him to ascertain the extent of right of such landlord in the estate."<sup>1</sup> While this is the rule that prevails in the majority of the States, it is in conflict with the English decisions, and several in our own country.<sup>2</sup>

**§ 775 a. Notice from clause of option to purchase in lease.**—A clause in a lease by which the tenant has the option to purchase the demised premises, is not a part of the lease, although it may be incorporated in it. It is a distinct, independent agreement, and not necessarily connected with the lease, and is not usually a part of it. A person who has knowledge of a lease cannot object, if he purchases the property without examining the lease, that he did not have notice of a particular covenant, and, even in some cases, notice may be imputed to him of unusual covenants, and even of a collateral agreement to purchase. But where notice arises from the fact of possession and the duty to inquire, the purchaser is charged not only

<sup>1</sup> *Dickey v. Lyon*, 19 Iowa, 544, 549, per Cole, J., and cases cited. Where a lessor having title of record in his name when a judgment is docketed against him has conveyed the land to another who has informed the tenant of the execution of the deed, a judgment creditor will not be charged with notice. He is charged with notice of such facts only as by inquiry he might naturally be informed of and not of such facts as the inquiry might possibly lead to: *Wilkins v. Bevier*, 43 Minn. 213; 19 Am. St. Rep. 238. A tenant's possession affords notice of an unrecorded lease: *Dreyfus v. Hirt*, 82 Cal. 621; and of the unrecorded deed of his lessor: *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Levy v. Holberg*, 67 Miss. 526.

<sup>2</sup> *Hanbury v. Litchfield*, 2 Mylne & K. 629; *Jones v. Smith*, 1 Hare, 43; *Barnhart v. Greenshields*, 9 Moore P. O. C. 36; *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234; *Flagg v. Mann*, 2 Sum. 486. See, also, *Veazie v. Parker*, 23 Mo. 170; *Roll v. Rea*, 50 N. J. L. 266. And see *Smith v. Miller*, 63 Tex. 72.

when it may be presumed that he actually knew, but also when there are reasons for believing that by reasonable diligence he would have discovered the truth. The tenant's possession imposes upon an intending purchaser the duty of inquiry as to the tenant's title, but as between the vendor and himself, the purchaser will be charged with notice of the covenants of a lease of which he had knowledge, but had not examined, and as to whose contents he has been in no manner misled, but he will not be charged with notice of a distinct collateral agreement. If the agreement to sell has been separate and distinct from the lease, it would not, as between the vendor and vendee, have been notice of the equity of the tenant. Hence, if the tenant exercises his option to purchase during the existence of the tenancy, the vendee may purchase from the tenant and recover the difference in price from the lessor.<sup>1</sup>

§ 776. **Comments.** — The underlying principle on which the notice arising from possession is based, is that a fact is presented to the purchaser's attention, which, if he is acting in good faith, is sufficient to cause him to pause, and ascertain to what title that fact is attributable. He should satisfy himself as to the extent of the claim made by the party in possession. If he finds that the latter is holding under an unrecorded deed, he knows that he cannot secure a valid title. If the person in possession is holding as a tenant of one who has an unrecorded deed, this fact is as easily learned as if the tenant was himself the grantee in the unrecorded deed. The landlord's title can be ascertained. The purchaser should at least make an effort to ascertain the character of the title of the party in possession. If he does not make the attempt, he must suffer the consequences of his negligence. He is chargeable with notice of all that a proper inquiry would have disclosed. We think that when the doctrine of notice from possession is once admitted, the

<sup>1</sup> *Wertheimer v. Thomas*, 168 Pa. St. 168; 47 Am. St. Rep. 882.

possession of a tenant should be notice of the title of the landlord.

§ 777. **An inference of fact.**—While in many cases expressions are found to the effect that possession is notice itself, yet these seem to be incorrect statements of the true rule. In such cases certain facts have existed which the court considered sufficient to put a party upon inquiry, and, having failed to prosecute it, he is chargeable with all he might have learned if he had commenced an investigation and diligently prosecuted it. There can be little or no doubt that if such inquiry had been properly prosecuted, and the party had not obtained information as to the true title, he would not be held charged with notice. That is, the notice given by possession is an inference of fact. The correct rule, it seems to us, is stated by Mr. Justice Selden: "Possession by a third person, under some previous title, has frequently but inaccurately been said to amount to constructive notice to a purchaser of the nature and extent of such prior right. Such a possession puts the purchaser upon inquiry, and makes it his duty to pursue his inquiries with diligence, but is not absolutely conclusive upon him"; and further, "the true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."<sup>1</sup>

<sup>1</sup> In *Williamson v. Brown*, 15 N. Y. 354. In *Rogers v. Jones*, 8 N. H. 264, 270, Mr. Justice Parker, in delivering the opinion of the court, said: "Possession is by no means conclusive evidence of the existence of a title in the party in possession. It may be *prima facie* evidence of title, and is, in general, a sufficient notice to put a third person on inquiry (Colby



Where a person has paid the full consideration, taken possession and erected permanent and valuable improvements, he has a perfect equitable title, and in a suit by a subsequent purchaser for possession, the prior purchaser may set up his equitable title by way of cross-complaint, and obtain a decree to quiet his title.<sup>1</sup>

### PART III.

#### AGENCY.

§ 778. **Notice to an agent.**—The law implies to the principal such notice as the agent acquires as to the state of the title, when engaged in negotiations for the purchase of the property.<sup>2</sup> The notice to bind the principal

*v. Kenniston*, 4 N. H. 266; *Daniels v. Davison*, 16 Ves. 254; *Allen v. Anthony*, 1 Mer. 283); and to charge him constructively with notice of an existing title under which the tenant entered if he neglects it. But being a notice which puts a party on inquiry merely, it is not, as we have seen, necessarily constructive notice. If the demandant had inquired of the tenant whether he held a deed, and been told he had none, it would be very preposterous to say that he was, notwithstanding, to be charged with constructive notice of the deed to the wife, because she also lived on the land, and he had not inquired of her. Were this otherwise, an owner who was in possession would have an absolute exemption from the provisions of the registry act, his possession amounting to constructive notice, or, in other words, to conclusive evidence of notice of his title." See, also, *Fair v. Stevenot*, 29 Cal. 486; *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526; *Whitbread v. Jordan*, 1 Younge & C. 303; *Thompson v. Pioche*, 44 Cal. 508; *Flagg v. Mann*, 2 Sum. 486.

<sup>1</sup> *Barnes v. Union School Township*, 91 Ind. 301.

<sup>2</sup> *Meier v. Blume*, 80 Mo. 179; *Bank of United States v. Davis*, 2 Hill, 451; *Williamson v. Brown*, 15 N. Y. 354, 359; *Josepthal v. Heyman*, 2 Abb. N. C. 22; *Hovey v. Blanchard*, 13 N. H. 145; *Walker v. Schreiber*, 47 Iowa, 529; *Ames v. New York Ins. Co.*, 14 N. Y. 253; *First Nat. Bank of Milford v. Town of Milford*, 36 Conn. 93; *Farrington v. Woodward*, 82 Pa. St. 259; *Westervelt v. Haff*, 2 Sand. Ch. 98; *Holden v. New York etc. Bank*, 72 N. Y. 86; *Allen v. Poole*, 54 Miss. 323; *Fuller v. Bennett*, 2 Hare, 394; *Boursot v. Savage*, Law R. 2 Eq. 134; *Rickards v. Gledstones*, 3 Giff. 298. See, also, *Owens v. Roberts*, 36 Wis. 258; *Ward v. Warren*, 82 N. Y. 265; *Suit v. Woodhall*, 113 Mass. 391; *Jones v. Bamford*, 21 Iowa, 217; *Smith v. Denton*, 42 Iowa, 48; *Tagg v. Tennessee National Bank*, 9 Heisk. 479; *Jackson v. Leek*, 19 Wend. 339; *Myers v. Ross*, 3 Head, 59; *Saffron etc. Soc. v. Rayner*, Law R. 14 Ch. D. 406; *Atterbury v. Wallis*, 8 De Gex, M. & G. 454; *Dryden v. Frost*, 3 Mylne & C. 670; *Sheldon v. Cox*, 2 Eden, 224; *Tunstall v. Trappes*, 3 Sim. 301; *Dickerson*

must be given in the same transaction in which the agent is employed by the principal.<sup>1</sup> If a person, while a director of a corporation, executes a deed of land which he owns, and subsequently makes a mortgage to the corporation, the latter is not charged with constructive notice of such prior deed. In the proceedings connected with the mortgage, the director deals with the corporation as a third party. His acts in this matter are against the corporation, and for himself alone.<sup>2</sup> If before the commence-

*v. Bowers*, 42 N. J. Eq. 295; *Stokes v. Riley*, 121 Ill. 166; *Bigley v. Jones*, 114 Pa. St. 510; *Young v. Shauer*, 73 Iowa, 555; 5 Am. St. Rep. 701; *Matthews v. Riggs*, 80 Me. 107; *Donald v. Beals*, 57 Cal. 399; *Cogswell v. Griffith*, 23 Neb. 334; 36 N. W. Rep. 538; *Cowan v. Withrow*, 111 N. C. 306; 16 S. E. Rep. 397; *Hickman v. Green*, 123 Mo. 165; 27 S. W. Rep. 440; *Merchants' Nat. Bank v. Lovett*, 114 Mo. 519; 35 Am. St. Rep. 770; *Slattery v. Schwannecke*, 118 N. Y. 543; 23 N. E. Rep. 922; *Morrison v. Bausemer*, 32 Gratt. 225; *Bigley v. Jones*, 114 Pa. St. 510; 7 Atl. Rep. 54; *Smith v. Ayer*, 101 U. S. 320; *Yerger v. Barz*, 56 Iowa, 77; 8 N. W. Rep. 769; *Stanley v. Chamberlin*, 39 N. J. L. 565.

<sup>1</sup> *New York Central Ins. Co. v. National Ins. Co.*, 20 Barb. 468; *Warrick v. Warrick*, 3 Atk. 291; *Fuller v. Bennett*, 2 Hare, 404. See, also, *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Houseman v. Girard etc. Assn.*, 81 Pa. St. 256; *Weisser v. Dennison*, 10 N. Y. 68; 61 Am. Dec. 731; *North River Bank v. Aymar*, 3 Hill, 262; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 350; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; *Finch v. Shaw*, 19 Beav. 500; *Wyllie v. Pollen*, 3 De Gex, J. & S. 596; *Banco de Lima v. Anglo-Peruvian Bank*, Law R. 8 Ch. D. 160; *Lloyd v. Attwood*, 3 De Gex & J. 614; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Barbour v. Wiehle*, 116 Pa. St. 308; 9 Atl. Rep. 520; *Hood v. Fahnestock*, 8 Watts, 489; 34 Am. Dec. 489; *Fry v. Shehee*, 55 Ga. 208; *Pepper v. George*, 51 Ala. 190; *Pacific Mfg. Co. v. Brown*, 8 Wash. 347; 36 Pac. Rep. 763; *May v. Borel*, 12 Cal. 91; *Whitney v. Burr*, 115 Ill. 289; 3 N. E. Rep. 434; *Rogers v. Palmer*, 102 U. S. 263; *Satterfield v. Malone*, 35 Fed. Rep. 445; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Clark v. Fuller*, 39 Conn. 238; *Wood v. Rayburn*, 18 Or. 3; 22 Pac. Rep. 521; *Haywood v. Shaw*, 16 How. Pr. 119; *Weisser v. Dennison*, 10 N. Y. 68; 61 Am. Dec. 731; *Hodgkins v. Montgomery Co. Ins. Co.*, 34 Barb. 213; *Morrison v. Bausemer*, 32 Gratt. 225; *Tucker v. Tilton*, 55 N. H. 223; *Willis v. Vallette*, 4 Met. (Ky.) 186; *Kaufman v. Robey*, 60 Tex. 308; 48 Am. Rep. 264; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; *Harrington v. McFarland*, 1 Tex. Civ. App. 289; 21 S. W. Rep. 116; *Smith v. Sublett*, 28 Tex. 163; *Irvine v. Grady*, 85 Tex. 120; 19 S. W. Rep. 116.

<sup>2</sup> *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54. See, also, *Winchester v. Susquehanna R. R.*, 4 Md. 231; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33. In the latter case the court said: "His interest is opposed

ment of the agency the agent had notice of an unrecorded lien on a piece of real property, and his principal afterward takes a deed of it, it requires very strong evidence to show that at the time of the execution of the deed, or of the purchase, the agent remembered the reception of such notice to charge the principal with the notice of the agent.<sup>1</sup>

**§ 779. Matter material to the transaction.**—To affect the principal with the notice received by the agent, the notice must be of some fact material to the transaction. If the authority of the agent is confined to obtaining the execution of the deed, the notice of the agent is not imputable to the principal.<sup>2</sup> A grantor took a mortgage from his grantee to secure the payment of the purchase money, and intrusted it to the grantee to have it recorded. Before depositing the mortgage for record, the grantee and mortgagor sold the land to a *bona fide* purchaser, by a written executory contract. Such purchaser paid the grantee a full and valuable consideration, and had no notice whatever of the rights of the mortgagee. The mortgage was recorded before the mortgagee had any notice of the rights of the contract purchaser, and before the latter had acquired the legal title or had taken actual notorious possession. The mortgagee was held to have the priority of right.<sup>3</sup> The notice must be received by the agent, while acting as such, during the course of his actual employment.<sup>4</sup> The rule that the principal is bound

to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it. Where an officer of a corporation is thus dealing with them, in his own interest opposed to theirs, he must be held not to represent them in the transaction so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys."

<sup>1</sup> *Morrison v. Bausemer*, 32 Gratt. 225.

<sup>2</sup> *Wyllie v. Pollen*, 32 Law. J., N. S., 782.

<sup>3</sup> *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115. See *Hoppock v. Johnson*, 14 Wis. 303.

<sup>4</sup> *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388; *Smith v. Den-*

by notice to his agent is not altered by the fact that the agent is unable to read or write.<sup>1</sup>

§ 780. **Agent for both parties.**—When both the grantor and grantee employ the same agent or attorney, the knowledge that he acquires during the continuance of his agency is the knowledge of both parties.<sup>2</sup> A solicitor induced a client to take a mortgage upon certain lands, and afterward induced another client to take a mortgage also on the same land. The solicitor did not inform the second mortgagee of the first mortgage. The second mortgage was first registered. But it was held that the second mortgagee must be considered as having had, through the solicitor, notice of the first mortgage, and did not obtain precedence by priority of registration.<sup>3</sup>

§ 781. **Fraud of agent.**—The law presumes that the agent will acquaint his principal with such information as he acquires in the course of the transaction in which he is employed. But where the agent intends to commit a fraud for his own benefit, this presumption, of course, can no longer prevail. In such a case it is essential in order that the agent may carry out his fraudulent design that he should conceal the real facts from his principal. A contrary presumption, where the agent has been guilty of fraud, naturally arises, that no communication has

ton, 42 Iowa, 48; *May v. Borel*, 12 Cal. 91; *Clark v. Fuller*, 39 Conn. 238; *Weisser v. Dennison*, 10 N. Y. 68; 61 Am. Dec. 731; *Russell v. Swezey*, 22 Mich. 235; *Fry v. Shehee*, 55 Ga. 208; *Jones v. Bamford*, 21 Iowa, 217; *Hodgkins v. Montgomery Co. Ins. Co.*, 34 Barb. 213; *Pepper v. George*, 51 Ala. 190; *Spadone v. Manvel*, 2 Daly, 263; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468; *Saffron etc. Soc. v. Rayner*, Law R. 14 Ch. D. 406; *Dryden v. Frost*, 3 Mylne & C. 670; *Wilde v. Gibson*, 1 H. L. Cas. 605; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; *Tucker v. Tilton*, 55 N. H. 223.

<sup>1</sup> *Meier v. Blume*, 80 Mo. 179.

<sup>2</sup> *Losey v. Simpson*, 11 N. J. Eq. 346; *Fuller v. Bennett*, 2 Hare, 403; *Brotherton v. Hatt*, 2 Vern. 574; *Hargreaves v. Rothwell*, 1 Keen, 154. See, also, *Dryden v. Frost*, 3 Mylne & C. 670; *Majoribanks v. Hovenden*, Dru. 11; *Tucker v. Henzill*, 4 Irish Ch. Rep. 513; *Sheldon v. Cox*, 2 Eden, 224; *Tweedale v. Tweedale*, 23 Beav. 341.

<sup>3</sup> *Rolland v. Hart*, Law R. 6 Ch. 678. See, also, *Boursot v. Savage*, Law R. 2 Eq. 134.

been made to the principal by the agent of the facts which he has learned during his agency. Therefore, in case of the agent's fraud the principal is not affected with notice to the agent.<sup>1</sup>

**§ 782. Notice to a partner.**—Where a person has actual notice of a prior deed, and, with his partners, purchases the same land, his partners in the purchase are affected with the same notice, although at the time they knew nothing of such purchase. The purchaser, by taking a deed in the name of his associates, is regarded as having acted as their agent. Notice to him, therefore, is equivalent to notice to them. "It would indeed be singular if the legal effect of notice could be obviated by so easy a subterfuge as the insertion of the names of other parties in the conveyance."<sup>2</sup>

**§ 783. Consulting attorney.**—If a person, before making a purchase of a piece of land, consults with an attor-

<sup>1</sup> *Cave v. Cave*, Law R. 15 Ch. 639; *Frail v. Ellis*, 16 Beav. 350; *Kennedy v. Green*, 3 Mylne & K. 699; *In re European Bank*, Law R. 5 Ch. 358; *Waldy v. Gray*, Law R. 20 Eq. 238, 251; *Hiorns v. Holtom*, 16 Beav. 259; *Ogilvie v. Jeaffreson*, 2 Giff. 353; *Winchester v. Susquehanna R. R.*, 4 Md. 231; *Fulton Bank v. New York and Sharon C. Co.*, 4 Paige, 127; *Hope Fire Ins. Co. v. Cambrelling*, 1 Hun, 493; *Barnes v. Trenton Gas Co.*, 27 N. J. Eq. (12 Green, C. E.) 33; *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 368; *Rolland v. Hart*, Law R. 6 Ch. 678; *Thompson v. Cartwright*, 2 De Gex, J. & S. 10; *Greenslade v. Dare*, 20 Beav. 284; *Spencer v. Topham*, 2 Jur., N. S., 865; *Hewitt v. Loosemoore*, 9 Hare, 449; *Robinson v. Briggs*, 1 Smale & G. 188; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Allen v. South Boston R. Co.*, 150 Mass. 200; 15 Am. St. Rep. 175; 22 N. E. Rep. 917; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332; 52 Am. Rep. 710; *Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736; 2 So. Rep. 758; *Dillaway v. Butler*, 135 Mass. 479; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147. But the fraud must be independent in its character, so that concealment was essential to its success. Every concealment is not a fraud: *Atterbury v. Walles*, 8 De Gex, M. & G. 454; *Rolland v. Hart*, Law R. 6 Ch. 678; *Boursot v. Savage*, Law R. 2 Eq. 134. The signing of a deed by a person assuming to act as an agent of another may give notice of the interest of his principal in the land: *Solari v. Snow*, 101 Cal. 387.

<sup>2</sup> *Stanley v. Green*, 12 Cal. 148. See *Wise v. Tripp*, 13 Me. 9; *Stevens v. Goodenough*, 26 Vt. 676; *Cunningham v. Woodbridge*, 76 Ga. 302; *Littleton v. Giddings*, 47 Tex. 109.

ney for the purpose of having him examine the records to see what conveyances were of record, he is not chargeable with all the knowledge which the attorney may possess concerning the matter about which such purchaser has consulted him.<sup>1</sup> The notice to the agent is not notice to the principal, unless it is present in his mind when acting as agent, and he may convey his information without a violation of professional confidence. Where, by mistake, one of a firm of attorneys executes a total instead of a partial release of a mortgage, and this release is recorded, and afterward, on the negotiation of another loan, the borrower employs the same firm to examine the title for him, but the examination is made by another member of the firm, who possessed no knowledge of the prior transaction, and knew nothing of the title except what the abstract disclosed, notice of the mistake in making a total release of the mortgage cannot be charged to the borrower.<sup>2</sup>

§ 784. **Notice to trustee.**—Where a person is to act as trustee by an agreement between the grantor and *cestui que trust*, and the trustee has notice of the fraudulent intent with which the grantor executed the deed of conveyance wherein he is named as trustee, the *cestui que trust* is affected with the notice in this respect possessed by the trustee.<sup>3</sup>

§ 785. **Agent to examine title.**—One person relied upon another to take a mortgage, and to see that the title was perfect. It was held that the former to this extent made the latter his agent, and that he was chargeable with the agent's knowledge of a pre-existing mortgage.<sup>4</sup>

<sup>1</sup> *Meuley v. Zeigler*, 23 Tex. 88.

<sup>2</sup> *Wittenbrock v. Parker*, 102 Cal. 93; 41 Am. St. Rep. 172. See, also, *Arrington v. Arrington*, 114 N. C. 151; 19 S. E. Rep. 351.

<sup>3</sup> *Pope v. Pope*, 40 Miss. 516. Notice to the trustee is generally notice to the beneficiary: *Pope v. Pope*, 40 Miss. 516; *Meyers v. Ross*, 3 Head, 59; *Stevens v. Goodenough*, 26 Vt. 676. But where the trustee is appointed by the grantor to secure a debt, see *Fargason v. Edrington*, 49 Ark. 207.

<sup>4</sup> *Sowler v. Day*, 58 Iowa, 252. Notice to the attorney is notice to the

§ 786. **Advertisement of sale.**—A notice stating that certain property is for sale may be as effectual for the purpose of giving notice as a statement from the owner himself. The agent of a person claiming title to a piece of property put upon the premises a board on which was printed: "For sale by S. H. Kerfoot & Co., 48 Clark Street." A creditor whose judgment lien accrued while this notice remained posted, was held to be notified of the interest of the party claiming title. The extent and character of the title could have been ascertained upon inquiry of the agents, and the judgment creditor therefore could not be regarded a *bona fide* purchaser.<sup>1</sup>

§ 787. **Resale by vendor.**—Where a contract for the sale of real estate is made, and the vendor, professing to act as the agent of the original vendee under verbal authority, and that of letters subsequently written, resells the premises, and executes a deed therefor to a second purchaser, the letters must be looked to as the only proper and valid source of authority. If these letters do not in fact authorize such resale and conveyance, and the purchaser is aware of the contents of such letters, and of the terms of the original contract, he is not a *bona fide* purchaser without notice. "In such case, he is to be treated as a trustee of the first vendee; he stands upon the same

client. See *Edwards v. Hillier*, 70 Miss. 803; 13 So. Rep. 692; *Smith v. Ayer*, 101 U. S. 320; *Bunker v. Gordon*, 81 Me. 66; 16 Atl. Rep. 341; *Shoemaker v. Smith*, 80 Iowa, 655; 12 N. W. Rep. 297; *Jones v. Bamford*, 21 Iowa, 217; *Jackson v. Van Valkenburgh*, 8 Cow. 260; *May v. Le Claire*, 11 Wall. 217; *Maxfield v. Burton*, 17 L. R. Eq. 15.

<sup>1</sup> *Hatch v. Bigelow*, 39 Ill. 546. The court, per Mr. Justice Breese, said: "A purchaser is held affected with notice of all that is patent on an examination of the premises he is about to buy. Is not, then, this advertising board to be regarded in precisely the same light as if a subsequent purchaser had been informed in writing that Kerfoot claimed the right to sell the lot, and therefore claimed some title or interest in it? And does not such notice put the purchaser upon inquiry as to that interest, whatever it may be, and whether held by Kerfoot, in his own right, or as agent of another? A prudent man would have gone to Kerfoot, whose place of business is given, and ascertained the nature of his claim before completing a purchase."



equity as his vendor, and will be decreed to convey in the same manner as the original vendor under whom he claims."<sup>1</sup>

#### PART IV.

##### LIS PENDENS.

§ 788. **Doctrine of lis pendens.**—"It is the manifest policy of the law that there should be an end to litigation, but this manifest policy would be easily thwarted if, during the pendency of suit, a stranger to the suit could, by purchase from one of the suitors, acquire new and independent rights—rights unaffected by and not subject to the litigation then in progress."<sup>2</sup> Hence arises the doctrine of *lis pendens*. During the pendency of a suit neither party should be permitted to convey the property in controversy so as injuriously to affect the rights of his adversary. It is sometimes said that the rules as to the effect of a pending suit are founded upon the doctrine of constructive notice, but the better view seems to be that these rules rest rather on grounds of public policy. "It is obvious that there must be cases to which the doctrine should apply; otherwise the ends of justice might be defeated; the decrees of the court would be evaded, and the party having the strongest inducement to prolong litigation would not unfrequently find it in his power to do so to an unlimited extent. It is a rule founded upon a great public policy."<sup>3</sup> "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts, both of law and of equity, and rests, as I apprehend, upon this foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or de-

<sup>1</sup> *Smoot v. Rea*, 19 Md. 398, 412.

<sup>2</sup> *Real Estate Savings Inst. v. Collonious*, 63 Mo. 290, 294.

<sup>3</sup> *Norton v. Birge*, 35 Conn. 250, 258, per Carpenter, J.

cree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding.”<sup>1</sup> Aside from any statutory provision, the doctrine of *lis pendens* is everywhere recognized.<sup>2</sup> The operation of a *lis pendens* extends also to the grantee of a grantee.<sup>3</sup>

<sup>1</sup> *Bellamy v. Sabine*, 1 De Gex & J. 566, 584, per Lord Justice Turner.

<sup>2</sup> *Murray v. Finster*, 2 Johns. Ch. 155; *Murray v. Ballou*, 1 Johns. Ch. 566; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Hopkins v. McLaren*, 4 Cowen, 667; *Gossom v. Donaldson*, 18 Mon. B. 230; 68 Am. Dec. 723; *Green v. White*, 7 Blackf. 242; *Kern v. Hazlerigg*, 11 Ind. 443; 71 Am. Dec. 360; *Ashley v. Cunningham*, 16 Ark. 168; *Jackson v. Andrews*, 7 Wend. 152; 22 Am. Dec. 574; *Seabrook v. Brady*, 47 Ga. 650; *Sedgwick v. Cleveland*, 7 Paige, 287; *Cook v. Mancius*, 5 Johns. Ch. 89; *Turner v. Babb*, 60 Mo. 342; *Van Hook v. Throckmorton*, 8 Paige, 33; *Harrington v. Shade*, 22 Barb. 161; *McGregor v. McGregor*, 21 Iowa, 441; *Cooley v. Brayton*, 16 Iowa, 10; *Loomis v. Riley*, 24 Ill. 307; *Whiting v. Beebe*, 7 Eng. 421; *White v. Carpenter*, 2 Paige, 217; *Griffith v. Griffith*, 1 Hoff. Ch. 153; *Chapman v. West*, 17 N. Y. 125; *Pratt v. Hoag*, 5 Duer, 631; *Borrowdale v. Tuttle*, 5 Allen, 377; *Hersey v. Turbett*, 27 Pa. St. 418; *Tredway v. McDonald*, 51 Iowa, 663; *Oulpepper v. Aston*, 2 Ch. Cas. 115; *Garth v. Ward*, 2 Atk. 174; *Roberts v. Fleming*, 53 Ill. 196; *Gilman v. Hamilton*, 16 Ill. 225; *Jackson v. Warren*, 32 Ill. 331; *Truitt v. Truitt*, 38 Ind. 16; *Preston v. Tubbin*, 1 Vern. 286; *Higgins v. Shaw*, 2 Dru. & War. 356; *Patterson v. Brown*, 32 N. Y. 81; *Mitchell v. Smith*, 53 N. Y. 413; *O'Reilly v. Nicholson*, 45 Mo. 160; *Tharpe v. Dunlap*, 4 Heisk. 674; *Blanchard v. Ware*, 43 Iowa, 530; *Holman v. Patterson's Heirs*, 29 Ark. 357; *Sorrell v. Carpenter*, 2 P. Wms. 482; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Brundage v. Biggs*, 25 Ohio St. 652; *Hayden v. Bucklin*, 9 Paige, 512; *Haven v. Adams*, 8 Allen, 363; *McPherson v. Housel*, 2 Beas. 299; *Tongue v. Morton*, 6 Har. & J. 21; *Ashley v. Cunningham*, 16 Ark. 168; *Edwards v. Banksmith*, 35 Ga. 213; *Choudron v. Magee*, 8 Ala. 570; *Knowles v. Rablin*, 20 Iowa, 101; *Leitch v. Wells*, 48 N. Y. 585; *Ayrault v. Murphy*, 54 N. Y. 202; *Salisbury v. Mores*, 7 Lans. 359; *Jackson v. Losee*, 4 Sand. Ch. 381; *Long v. Neville*, 29 Cal. 135; *Parks v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656; *Jackson v. Andrews*, 7 Wend. 152; 22 Am. Dec. 574; *Watson v. Dowling*, 26 Cal. 124; *Tyler v. Thomas*, 25 Beav. 47; *Young v. Guy*, 23 Hun, 1; *Newman v. Chapman*, 2 Rand. 93; 14 Am. Dec. 766; *Lawrence v. Conklin*, 17 Hun, 228; *Allen v. Poole*, 54 Miss. 323; *Center v. Planters' and Merchants' Bank*, 22 Ala. 743; *Arrington v. Arrington*, 114 N. C. 151; 19 S. E. Rep. 351; *Collingwood v. Brown*, 106 N. C. 362; 10 S. E. Rep. 868; *Spencer v. Credle*, 102 N. C. 63; 8 S. E. Rep. 901; *Hart v. Steedman*, 98 Mo. 452; *Dwyer v. Rippetoe*, 72 Tex. 520; *Cassidy v. Kluge*, 73 Tex. 154.

<sup>3</sup> *Norton v. Birge*, 35 Conn. 250. But see *French v. Loyal Co.*, 5 Leigh, 627.

§ 789. **Alienation void as against judgment.**—If a defendant were allowed to execute an effectual and operative deed of the land in controversy during the pendency of a suit affecting its title, a judgment in favor of the plaintiff would be of little or no value. A deed under these circumstances, though good between the parties themselves, can have no effect as against a judgment or decree that may be ultimately rendered in such suit.<sup>1</sup> “The principle that the purchaser of the subject-matter of a suit *pendente lite* acquires no interest as against the plaintiff’s title, whether legal or equitable, is too well established to be now questioned. Such sale as against the plaintiff is considered a nullity, and he is not bound to take any notice of it. The decree of the court binds the property in the hands of such purchaser, although he is no party to the suit, and paid a full price for it, and had in fact no notice of the pendency of the suit, or the claim of the plaintiff. He is chargeable with constructive notice of the pendency of such suit, so as to render his interest in the subject of it liable to its event. This rule may sometimes produce individual hardship in its application to a purchaser, for a full consideration, and without actual notice; but if it were not adopted and adhered to, there would be no end to any suit. The justice of the court would be wholly evaded by aliening the lands after subpoena served and the suitor subjected to great delay, expense, and inconvenience, without any certainty of at last securing his interest. It is for these reasons—reasons founded on public utility and general convenience—that

<sup>1</sup> *Calderwood v. Tevis*, 23 Cal. 335; *Sharp v. Lumley*, 34 Cal. 611; *Montgomery v. Byers*, 21 Cal. 107; *Horn v. Jones*, 28 Cal. 194; *Whiteside v. Haselton*, 110 U. S. 296; *Snowman v. Harford*, 62 Me. 434; *Lee v. Salinas*, 15 Tex. 495; *Bayer v. Cockerill*, 3 Kan. 282; *Copenheaver v. Huffaker*, 6 Mon. B. 18; *Galbreath v. Estes*, 38 Ark. 599; *Jackson v. Andrews*, 7 Wend. 152; 22 Am. Dec. 574; *Shotwell v. Lawson*, 30 Miss. 27; 64 Am. Dec. 145; *Hurlbutt v. Butenop*, 27 Cal. 50; *Tilton v. Cofield*, 93 U. S. 163; *Jackson v. Warren*, 32 Ill. 331; *Meux v. Anthony*, 6 Eng. 411; 52 Am. Dec. 274; *Walden v. Bodley’s Heirs*, 9 How. 34; *Inloe’s Lessee v. Harvey*, 11 Md. 519; *Gregory v. Haynes*, 13 Cal. 594; *Haynes v. Calderwood*, 23 Cal. 409; *Curtis v. Sutter*, 15 Cal. 263.

the courts of equity of England, and of the United States, whenever the question has been made, have uniformly held that he who purchases during the pendency of a suit is chargeable with constructive notice of the rights of the parties litigant, and bound by the decision that may be made against the person from whom he derives title."<sup>1</sup>

**§ 790. Subject continued.**—If, while an action for the foreclosure of a mortgage is pending, a person with notice of the suit takes a deed of a portion or of the whole of the mortgaged premises, a purchaser under the decree has the same right to the issuance of a writ of assistance against such grantee as he has against the grantor.<sup>2</sup> Where a person purchases a piece of land at a sale under a decree of foreclosure, he is chargeable with notice of the rights of the plaintiff in another suit for the foreclosure of another mortgage on the same premises, and is bound by the decree rendered subsequently in the second suit, although he is not made a party to it.<sup>3</sup> One who purchases the land pending the litigation from one of the parties to the suit, and claiming under his deed alone, is as much bound as his grantor.<sup>4</sup>

**§ 791. Grantee of party to partition suit.**—Where a suit for partition is pending, a person who takes a deed from one of the parties to such suit for his interest in the land, acquires a title or interest in the premises, sub-

<sup>1</sup> *Heirs of Ludlow v. Kidd's Executors*, 3 Ohio, 541, 542, per Sherman, J.

<sup>2</sup> *Montgomery v. Byers*, 21 Cal. 107; *Montgomery v. Middlemiss*, 21 Cal. 103; 81 Am. Dec. 146. See, also, *Walker v. Douglas*, 89 Ill. 425; *Barelli v. Delassus*, 16 La. Ann. 280; *Boulden v. Lanahan*, 29 Md. 200; *Masson v. Saloy*, 12 La. Ann. 776; *Youngman v. Elmira R. R. Co.*, 65 Pa. St. 278.

<sup>3</sup> *Cooley v. Brayton*, 16 Iowa, 10. And that purchasers at execution sales are affected by the notice of a *lis pendens*, see, also, *Hart v. Marshall*, 4 Minn. 294; *Hall v. Jack*, 32 Md. 253; *Fish v. Raveries*, 32 Ala. 451; *Crooker v. Crooker*, 57 Me. 395; *Hersey v. Turbett*, 27 Pa. St. 418; *McPherson v. Housel*, 2 Beasl. 299; *Steele v. Taylor*, 1 Minn. 274; *Berry v. Whitaker*, 58 Me. 422.

<sup>4</sup> *Welton v. Cook*, 61 Cal. 481.

ject to such decree as may be finally rendered. The grantee by such purchase *pendente lite* becomes a party to the suit, whether he is a party to the record or not. It follows that whatever portion of the common property may be set off in severalty to his grantor, inures to the grantee's benefit. So, if during the pendency of such a suit for partition, a mortgage be made on an undivided interest of a tenant in common, the mortgage, after partition is made, is confined to the interest awarded to the tenant in common who executed the mortgage.<sup>1</sup> An action was brought against a purchaser at a partition sale to set aside the sale on account of fraud. The decision of the lower court was in favor of the defendant, but, on appeal, the decision was reversed, and after the reversal the defendant executed a deed of trust upon the land involved in the suit. A few days after the time the deed bore date, the cause was remanded, the prior sale canceled, and the property resold. It was held that one who derived title under the deed of trust took with notice of the *lis pendens*, and could not maintain ejectment against the person purchasing at the second judicial sale.<sup>2</sup> A purchaser at a tax sale obtained a decree by default quieting his title against one who had, in fact, previously conveyed the land, but the deed of the grantee had not been recorded and the grantee was not made a party. The decree was held not to bind the grantee, and his neglect to record the deed could not affect him.<sup>3</sup>

**§ 792. Purchaser from person not a party to the suit.** A person who purchases a tract of land from one who is not a party to the suit affecting it, or a privy to such party, is not charged with constructive notice of the *lis pendens*.<sup>4</sup> A held a mortgage upon a tract of land, and

<sup>1</sup> Loomis v. Riley, 24 Ill. 307.

<sup>2</sup> Real Estate Saving Inst. v. Collonious, 63 Mo. 290.

<sup>3</sup> Smith v. Williams, 44 Mich. 240.

<sup>4</sup> Scarlett v. Gorham, 28 Ill. 319; Miller v. Sherry, 2 Wall. 237; Parks v. Jackson, 11 Wend. 442; 25 Am. Dec. 656; Allen v. Morris, 34 N. J. L.

subsequently B acquired a lien on the same land, of which A had knowledge. B began proceedings to subject the land to his lien, and the tract, which had been divided into fifty-six building lots, was sold by a master to C. Some of the lots were mortgaged to B by C, and the remaining lots were discharged by the sale from B's lien. A had no notice of the suit or of any of the subsequent proceedings, but the deeds and mortgages in pursuance of the sale were duly recorded. Subsequently, B foreclosed the mortgage executed by C, and at the beginning of the suit filed a statutory notice of *lis pendens*. A, who had no actual notice of this suit, released to C, while the suit was pending, forty-two of the fifty-six lots. The fourteen lots still left subject to A's mortgage were a part of those which C had mortgaged to B, and all of C's lots not mortgaged to B were released by A. The court held that A was not affected with constructive notice of the first suit of B or of the sale under his decree; that the registration of the deeds to C and of C's mortgages was not notice to A, and A, when he released, was not obliged to search the records for deeds and encumbrances later than his mortgage; and that neither the foreclosure suit of B, nor the notice of *lis pendens* filed, could charge A with notice of B's proceedings, or of his rights under C's mortgages.<sup>1</sup>

§ 792 a. **Unrecorded deed.**—As has been said in other sections, unless some statutory provision controls the matter, an unrecorded deed is valid between the parties and those who are affected with notice, and is void only against subsequent purchasers in good faith and for value. But what rights has a grantee under an unrecorded deed as against a prior record of a *lis pendens* filed in a suit to determine a trust or the interests of the respective parties to the suit in the land? Is he

159; *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *Herrington v. Herrington*, 27 Mo. 560; *French v. The Loyal Co.*, 5 Leigh, 627; *Parsons v. Hoyt*, 24 Iowa, 154; *Clarkson v. Morgan*, 6 B. Mon. 441.

<sup>1</sup> *Stuyvesant v. Hone*, 1 Sand. Ch. 419.

bound by the judgment to which he is not a party, or are his rights unaffected? In many States this question is determined by statute, but where the statutes are silent the rule is that notice of a *lis pendens* is not a conveyance, and that it is not intended to confer new rights on the plaintiff, but to limit those which he had before, and hence whether a deed is or is not recorded is immaterial. A grantee under an unrecorded deed is not affected by the *lis pendens*.<sup>1</sup>

§ 793. **Cross-complaint.**—A person may be charged with notice of a *lis pendens* affecting land by the averments of a cross-complaint as well as by the complaint itself. A plaintiff filed a petition for the settlement of a partnership theretofore existing between him and the defendant. The defendant in his answer, among other things, set up by way of cross-petition a misapplication of partnership funds by the plaintiff, which he had fraudulently caused to be conveyed to his wife. The defendant asked in his answer that the plaintiff's wife and the person from whom the property was purchased be made parties, and that the property to which she held the legal title be subjected to the purposes of the partnership. The court ordered her and her grantor to be made parties, and she, by her attorney, applied for leave to answer, which was granted. It was held that by obtaining permission to answer, the wife entered her appearance as a party, and that a purchaser who subsequently obtained title to the land from the husband and wife was affected with notice of the suit.<sup>2</sup>

§ 794. **Principle applies also to actions at law.**—It has sometimes been asserted that the doctrine of *lis pen-*

<sup>1</sup> Warnock v. Harlow, 96 Cal. 298; 31 Am. St. Rep. 209; Hammond v. Paxton, 58 Mich. 393; Vose v. Martin, 4 Cush. 27; 50 Am. Dec. 750; Smith v. Williams, 44 Mich. 240; Hall v. Nelson, 23 Barb. 88; Freeman on Judgments, § 201. But see *contra*: Smith v. Hodson, 78 Me. 180; Norton v. Birge, 35 Conn. 250.

<sup>2</sup> Brundage v. Biggs, 25 Ohio St. 652.



*dens* applies exclusively to equitable suits.<sup>1</sup> But it is now established that the principle applies to actions at law as well. "This principle is not peculiar to courts of chancery; but the maxim that *pendente lite nihil innovetur*, is applied in real and mixed actions by the common law."<sup>2</sup> A executed a deed to B, B executed a deed to C, and C executed a deed to D. All these were fraudulent. E, who possessed no actual knowledge of any defect or infirmity in the title, took a mortgage from C. The records showed at the time he took the mortgage that the creditors of A had levied attachments on the property. The law provided that such attachments might be made the basis of proceedings in insolvency in the probate court, the institution of which would dissolve the attachments. As a matter of fact insolvency proceedings had been instituted, but E took his mortgage with the knowledge that such attachments had been levied, and had subsequently been discontinued; but he made no inquiry to ascertain whether insolvency proceedings had been commenced. The trustee in insolvency had brought a bill in equity against B to set aside the fraudulent deed to him, which suit was pending when E took his mortgage. The deed of B to C was executed and delivered before the commencement of the suit, but was not recorded or known to the trustee until a long time after the institution of the suit. The doctrine of notice of *lis pendens* was applied to the title acquired by E, and it was said that if he was not fully chargeable with notice of the rights of the trustee in insolvency, the application of the doctrine produced no hardship.<sup>3</sup>

<sup>1</sup> King v. Bill, 23 Conn. 593.

<sup>2</sup> Secombe v. Steele, 20 How. 94, 106, per Campbell, J; Bellamy v. Sabine, 1 De Gex & J. 584.

<sup>3</sup> Norton v. Birge, 35 Conn. 250. The court distinguish this case from King v. Bill, 28 Conn. 593. See, also, Sheridan v. Andrews, 49 N. Y. 478. Speaking of the effect of *lis pendens*, Green, J., in Newman v. Chapman, 2 Rand. 93, 100, 14 Am. Dec. 766, said: "Lord Hardwicke, in the leading case of Le Neve v. Le Neve, 3 Atk. 646, declared that the statutes of registry in England (which, as to the matter under consideration, are the same in effect as our statute), only vested the legal title

§ 795. **Actions of ejectment.**—Where an action of ejectment has been commenced against the person in possession of the property, one who acquires possession

in the subsequent purchaser, and left the case 'open to all equity'; and in that case, he relieved against a subsequent purchaser, upon *constructive*, and not upon *actual* notice, the notice being to an agent of the purchaser. A *lis pendens* has always been spoken of in the English court of chancery as a constructive notice to all the world, as all men are bound and presumed to take notice of the proceedings of a court of justice. If these propositions were universally true, it would seem to follow that a *lis pendens* purchaser was a purchaser with notice, and would take the property subject to the claims of the plaintiff in the suit as the defendant held it. In all questions of fact, the existence of the matter in question may be proved by direct evidence, or by proof of the other facts, from which it may justly be inferred that the fact in question does exist. A fact thus proved by circumstantial evidence, is taken to exist for all purposes as if it were proved by direct evidence. I cannot, therefore, feel the force of the observation frequently thrown out in modern cases, that a notice to affect a subsequent purchaser after an unregistered deed must be *actual*, and such as to affect his conscience, and not *constructive*. A notice proved by circumstances to exist, affects the conscience of the party as much as if proved by direct evidence. In all other cases, a purchaser of a legal estate with notice of a subsisting equity, is bound by *constructive*, as well as by *actual*, notice; and *that* because his conscience is affected, and he is guilty of a fraud. Without fraud on his part, his legal title ought to prevail. I see no reason why a difference should be made between the case of a purchaser after an unregistered deed, and a purchaser of a legal title, subject to any other equity as to the proof of the notice which ought to be held to bind them. This distinction between an *actual* and *constructive* notice, in the case of a purchaser after an unregistered deed, seems to have proceeded from a doubt whether the relief given in the early cases upon that subject, had not been in opposition to the spirit and the policy as well as the letter of the statutes of registry. The rule, as to the effect of a *lis pendens*, is founded upon the necessity of such a rule to give effect to the proceedings of courts of justice. Without it, the administration of justice might, in all cases, be frustrated by successive alienations of the property, which was the object of litigation pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. This necessity is so obvious, that there was no occasion to resort to the presumption that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of the day. For at common law the writ was pending from the first moment of the day on which it was issued

from the defendant *pendente lite* will be bound by the judgment that may be recovered in the ejectment suit, to the same extent as the defendant. Although such

and bore *teste*; and a purchaser on or after that day, held the property subject to the execution upon the judgment in that suit as the defendant would have held it if no alienation had been made. The court of chancery adopted the rule in analogy to the common law; but relaxed in some degree the severity of the common law. For no *lis pendens* existed until the service of the subpoena and bill filed; but it existed from the service of the subpoena, although the bill was not filed until long after; so that a purchaser after service of the subpoena, and before the bill was filed would, after the filing of the bill, be deemed to be a *lite pendente* purchaser, and as such be bound by the proceedings in the suit, although the subpoena gave him no information as to the subject of the suit. A subpoena might be served the very day on which it was sued out, and there is an instance in the English books of a purchaser who purchased on the day that the subpoena was served without actual notice, and who lost his purchase by force of this rule of law. This principle, however\* necessary, was harsh in its effects upon *bona fide* purchasers, and was confined in its operation to the extent of the policy on which it was founded; that is, to the giving full effect to the judgment or decree which might be rendered in the suit pending at the time of the purchase. As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a nonsuit, or if a suit in chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if at law or in chancery a suit abated, although in all these cases the plaintiff or his proper representative might bring a new suit for the same cause, he must make the one who purchased pending the former suit a party; and in this new suit such purchaser would not be at all affected by the pendency of the former suit at the time of his purchase. In the case of an abatement, however, the original suit might be continued in chancery by revivor, or at law, in real actions, abated by the death of a party, by *journies accounts*, and the purchaser still be bound by the final judgment or decree. If a suit be brought against the heir upon the obligation of his ancestor binding his heirs, and he alienates the land descended pending the writ upon a judgment in that suit, the lands in the hands of the purchaser would be liable to be extended in satisfaction of the debt. But if that suit were discontinued, abated, or the plaintiff suffered a nonsuit in a new action for the same cause, the purchaser would not be affected by the pendency of the former suit at the time of his purchase; and if he could be reached at law, in equity it could only be upon proof of actual notice and fraud. If a *lis pendens* was notice *then*, as a notice at or before the purchase would, in other cases, bind the purchaser in any suit in equity prosecuted at any time thereafter to assert the right of which he had notice, so ought the *lis pendens* to bind him in any subsequent suit prosecuted for the same cause; but it does not. Again, a bill of discovery, or to perpetuate the

grantee or assignee may not be made a party to the suit, he may be ejected under the judgment rendered against his grantor or assignor. If this were not the law, the defendant could compel the plaintiff to commence a new action as often as he made an assignment.<sup>1</sup> But the judgment binds only the parties and their privies. One whose possession is distinct from that for which the action is brought, cannot be ousted by an execution in such action.<sup>2</sup> The assignee, when subject to the judgment, is liable for mesne profits.<sup>3</sup> Parties who have acquired their rights before the commencement of a suit are not affected by a *lis pendens*.<sup>4</sup>

**§ 796. Diligence in prosecution of suit.**—The suit in order to affect a grantee with notice, must be prosecuted without unnecessary delay. There must be reasonable diligence used in endeavoring to obtain a final judgment.<sup>5</sup>

testimony of witnesses, ought, if all persons were bound to take notice of what is going on in courts of justice, to be a notice to all the world as much as a bill for relief. But these are decided to be no notice to any purpose; a proof that the rule as to the effect of a *lis pendens* is one of mere policy, confined in its operation strictly to the purposes for which it was adopted; that is, to give effect to the judgment and decrees of courts of justice, and that it is not *properly* a notice to any purpose whatsoever. The English judges and elementary writers have carelessly called it a notice, because, in one single case, that of a suit prosecuted to decree or judgment, it had the same effect upon the interests of the purchaser as a notice had, though for a different reason. But the courts have not in any case given it the real force and effect of a notice.”

<sup>1</sup> Howard v. Kennedy, 4 Ala. 592; 39 Am. Dec. 307; Wallen v. Huff, 3 Sneed, 82; 65 Am. Dec. 49; Jackson v. Tuttle, 9 Cowen, 233; Hickman v. Dale, 7 Yerg. 149; Jones v. Chiles, 2 Dana, 25; Smith v. Trabue, 1 McLean, 87.

<sup>2</sup> Howard v. Kennedy, 4 Ala. 592; 39 Am. Dec. 307; Fogarty v. Sparks, 22 Cal. 142. See, also, Chiles v. Stephens, 1 Marsh. 333.

<sup>3</sup> Jackson v. Stone, 13 Johns. 447; Bradley v. McDaniel, 3 Jones, 128.

<sup>4</sup> Houghwout v. Murphy, 22 N. J. Eq. 545; Chapman v. West, 17 N. Y. 125; Hunt v. Haven, 52 N. H. 162; Ensworth v. Lambert, 4 Johns. Ch. 605; People v. Connelly, 8 Abb. Pr. 128; Hopkins v. McLaren, 4 Cowen, 677; Hall v. Nelson, 23 Barb. 88; Curtis v. Hitchcock, 10 Paige, 399; Parks v. Jackson, 11 Wend. 442; 25 Am. Dec. 656. But see Norton v. Birge, 35 Conn. 250.

<sup>5</sup> Herrington v. McCollum, 73 Ill. 476; Gibler v. Trimble, 14 Ohio, 323;

Where for a period of nearly two years no step was taken in a case or motion made indicating an intention to prosecute the suit, and no excuse was offered, or explanation given for the delay, the court considered that there had been such gross and culpable negligence in the prosecution of the suit as to take away from the plaintiff the privilege of claiming the benefit of a notice of *lis pendens*.<sup>1</sup> "To entitle him to enforce it against *bona fide* purchasers, he has been held to reasonable diligence in the prosecution of his suit, and should be guilty of no palpable slips or gross irregularities in the management of the same, by which injury may accrue to the rights of others who are not parties."<sup>2</sup> And where a suit has been commenced in the name of persons who have no interest, for which reason the suit might properly have been dismissed, an afterward the names of those who have an interest are introduced, there has been such a slip, it is held in Kentucky, that the principle of *lis pendens* cannot be applied to intermediate purchasers.<sup>3</sup>

§ 797. Continued.—But in Iowa, where a suit was brought to enforce the specific performance of a contract for the conveyance of land, and a person bought the land during the pendency of the suit, and subsequently the bill on appeal being ordered to be dismissed with leave to the plaintiff to file a bill *de novo*, the plaintiff filed a new bill, making the purchaser a party, it was held that the purchaser took with notice of the *lis pendens*. The court said that if the grantee had purchased between the

Edmeston v. Lyde, 1 Paige, 637; 19 Am. Dec. 454; Murray v. Ballou, 1 Johns. Oh. 566; Trimble v. Boothby, 14 Ohio, 109; 45 Am. Dec. 526; Petree v. Bell, 2 Bush, 58; Watson v. Wilson, 2 Dana, 406; 26 Am. Dec. 459; Erhman v. Kendrick, 1 Met. (Ky.) 146; Clarkson v. Morgan, 6 B. Mon. 441, 448; Price v. McDonald, 1 Md. 403; 54 Am. Dec. 657; Myrick v. Selden, 36 Barb. 15, 22; Preston v. Tubbin, 1 Vern. 286. And see Ashley v. Cunningham, 16 Ark. 168; Debell v. Foxworthy, 9 B. Mon. 228; Mann v. Roberts, 11 Lea (Tenn.), 57.

<sup>1</sup> Petree v. Bell, 2 Bush, 58.

<sup>2</sup> Clarkson v. Morgan, 6 B. Mon. 441, 448.

<sup>3</sup> Clarkson v. Morgan, *supra*.

time the first suit terminated and the second commenced, it might be doubted whether he would be a purchaser with notice, but that under the circumstances, he could occupy no better position than if the first decree had been affirmed, instead of reversed on appeal.<sup>1</sup> And in Illinois, in a somewhat recent case, the point is directly decided that where a suit is dismissed and afterward reinstated, the doctrine of *lis pendens* has no application to a person purchasing after the dismissal, and before the revival of the suit.<sup>2</sup> It is held, however, in one case, that it is not necessary that the suit should be prosecuted with even ordinary diligence to enable a party to maintain the benefit of a *lis pendens*; that such benefit can be terminated only by unreasonable and unusual negligence in the prosecution of the suit.<sup>3</sup>

§ 798. **Reasonable excuse.**—Whether there has been unreasonable delay in any particular case must of necessity depend upon the circumstances of that case. As will be more particularly noticed in the following section the law of *lis pendens*, binding purchasers who have no actual knowledge of the suit, is considered a rigorous one, and in order that the plaintiff may retain the benefit he has secured, he must prosecute his suit with diligence or explain the cause for the delay. But while the delay may of itself be long, and apparently unpardonable, still, if the plaintiff can present a reasonable excuse for it, the court must enforce the rule that the notice of *lis pendens* has continued during the whole of the time.<sup>4</sup>

§ 799. **Rule of *lis pendens* not favored.**—It is said that the doctrine of *lis pendens* “has ever been regarded as a harsh and rigorous rule in its operation upon the rights of *bona fide* purchasers. The rule was dictated by

<sup>1</sup> *Ferrier v. Buzick*, 6 Iowa, 258. See, also, *Bishop of Winchester v. Paine*, 11 Ves. Jr. 200.

<sup>2</sup> *Herrington v. McCollum*, 73 Ill. 477.

<sup>3</sup> *Gossom v. Donaldson*, 18 Mon. B. 230; 68 Am. Dec. 723.

<sup>4</sup> *Wickliffe v. Breckenridge*, 1 Bush, 443.

necessity as indispensable to the rights of litigants, and as the means of terminating litigation about the matter in contest. But being a hard rule and operating with great severity in many instances upon the rights of innocent purchasers, it should never be carried in favor of a complainant asking its enforcement beyond the purpose and reason of its creation.”<sup>1</sup> And again it is said: “This rule adopted by courts of equity from necessity, and in imitation of the common law, that when the defendant in a real action aliens after suit brought, the judgment in such real action will overreach such alienation, is yet considered as against a real and fair purchaser without actual notice as a hard rule, and courts gladly avail themselves of any defect in the pleadings or proofs of the plaintiff to prevent its operation upon such a purchaser.”<sup>2</sup>

**§ 800. Effect of lis pendens on attorney's lien for fees.**—Where attorneys have a lien upon property recovered or protected by their services, which the court may declare to be such in the cause in which such services are rendered, the client has no power, during the pendency of the suit, to make such a disposition of the subject matter of the suit as will deprive the attorney of his lien, nor to transfer the property subsequently to any purchaser with notice.<sup>3</sup> In the case cited, Nelson, J., speaking for the court, said that “while it is the duty of the courts to protect clients against all unfair advantages on the part of their counsel, it is a duty of equal obligation to shield the attorney, so far as practicable, against the bad faith and ingratitude of clients. The lien of a vendor of land is enforced in equity against the vendee, although no reservation of a lien is contained in a deed. His equity grows out of the transaction, and we hold that an attorney is entitled to an equitable lien on the property or thing in litigation for his just and reasonable fees,

<sup>1</sup> Clarkson v. Morgan, 6 Mon. B. 441, 448, per Ewing, C. J.

<sup>2</sup> Ludlow's Heirs v. Kidd, 3 Ohio, 541, 543, per Sherman, J. See, also, Hayden v. Bucklin, 9 Paige, 511.

<sup>3</sup> Hunt v. McClanahan, 1 Heisk. 503.



and that the client cannot, while the suit is pending, so dispose of the subject matter in suit as to deprive the attorney of his lien, nor afterward to any purchaser with notice. The pendency of the suit is of itself notice to all persons, and the lien may be preserved and the notice extended, by stating its existence in the judgment or decree."

§ 801. **Suit must affect specific property.**—It is not sufficient to create a *lis pendens* as the term is understood when speaking of its effect as notice, that the suit may ultimately affect all or some particular portion of the real estate of the defendant. The property must be specified in the proceedings and as to this property all persons are charged with notice of the pending litigation affecting it. The doctrine of *lis pendens* has no application to a suit for a divorce and alimony, as such a suit does not relate to any particular piece of property.<sup>1</sup> In one case the court, while deciding that the law of *lis pendens* did not apply in a suit for divorce, intimated, however, that if the prayer of the petition had been to have alimony assigned out of a particular tract of land, the case would have had some resemblance to those in which the rule of *lis pendens* had been applied.<sup>2</sup> So a suit for a sum of money which

<sup>1</sup> Feigley v. Feigley, 7 Md. 537, 563; 61 Am. Dec. 375; Hamlin v. Bevans, 7 Ohio, 161; 28 Am. Dec. 625; Brightman v. Brightman, 1 R. I. 112. In the case first cited, the court said: "As well might a pending action at law to recover an ordinary debt be a *lis pendens* as to the property of a debtor, as a proceeding like the present, the purpose of each being to subject the property of the debtor to the payment of debts. *Lis pendens* is a proceeding relating to the thing or property in question."

<sup>2</sup> Brightman v. Brightman, 1 R. I. 112. And see Daniel v. Hodges, 87 N. O. 95. In the former case, the court said: "But the rule only relates to suits involving the title to property, and is not to be extended beyond the property involved in the suit: 1 McCord Ch. 264. The suit must relate to the estate, and not to anything collateral, such as money secured on it: 3 Atk. 392. The rule applies where a third person attempts to intrude into a controversy by acquiring an interest in the matter in dispute pending suit: 4 Cowen, 667; 2 Johns. Ch. 445. We do not apprehend that the rule of *lis pendens* is applicable to this case. The prayer of the complainant's petition was for divorce and for alimony out of her husband's estate. It did not affect the title to his real estate, or

may be satisfied by a sale of real estate, if not satisfied in some other mode, cannot be regarded as *lis pendens* so as to affect the title to the real estate of the defendant.<sup>1</sup>

§ 802. *When lis pendens commences.*—The commencement of a *lis pendens* dates from the service of the subpoena or other process giving the court jurisdiction.<sup>2</sup> If a defective subpoena is served after the filing of a bill to foreclose a mortgage, and, by stipulation, the service of

necessarily seek to put any encumbrance on it. Alimony is to be granted out of the personal or real estate, and is not necessarily a charge on either. Had the prayer in this case been for alimony to be assigned her out of this particular farm, the case would have somewhat resembled some of the cases in the books where the rule has been applied. But it is not so; it is general for alimony out of his estate. If such a prayer locks up the real, it equally does the personal, estate of a respondent to such a petition, and each and every part of it. The instant such a petition is filed, the respondent's business, however extensive it may be, must stop. Purchasers and dealers with him, by the policy of the law, are bound by the decree for alimony that may be passed, although they do not even know that they are dealing with a married man. Alimony will be claimed, and must be allowed to attach to any and every part of the personal property that the husband had at the filing of the petition. We do not think this case falls within the rule of *lis pendens*, nor within the reason of that rule." And see, also, *Gardner v. Peckham*, 13 R. I. 102.

<sup>1</sup> *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556. See, also, *White v. Perry*, 14 W. Va. 66; *Ray v. Roe*, 2 Blackf. 258; 18 Am. Dec. 159; *Low v. Pratt*, 53 Ill. 438; *Lewis v. Mew*, 1 Strob. Eq. 180; *Miller v. Sherry*, 2 Wall. 237; *Jones v. McNarrin*, 68 Me. 334; 28 Am. Rep. 66; *Green v. Slayter*, 4 Johns. Ch. 39; *Worsley v. Earl of Scarborough*, 3 Atk. 392. And see *Lockwood v. Bates*, 1 Del. Ch. 435; 12 Am. Dec. 121; *Center v. P. & M. Bank*, 22 Ala. 743.

<sup>2</sup> *Williamson v. Williams*, 11 Lea (Tenn.), 355; *Haughwout v. Murphy*, 22 N. J. Eq. 545; *Allen v. Poole*, 54 Miss. 323; *Murray v. Blatchford*, 1 Wend. 583; 19 Am. Dec. 537; *Majors v. Cowell*, 51 Cal. 478; *Leitch v. Wells*, 48 N. Y. 585; *Allen v. Mandaville*, 26 Miss. 397; *Edwards v. Banksmith*, 35 Ga. 213; *Hayden v. Bucklin*, 9 Paige, 512; *Butler v. Tomlinson*, 38 Barb. 641; *Jackson v. Dickenson*, 15 Johns. 309; 8 Am. Dec. 236; *Center v. The Bank*, 22 Ala. 743; *Farmers' Nat. Bank v. Fletcher*, 44 Iowa, 252; *Herrington v. Herrington*, 27 Mo. 560; *Powell v. Wright*, 7 Beav. 444; *Scott v. McMillan*, 1 Litt. 302; 13 Am. Dec. 239; *Campbell's case*, 2 Bland, 209; 20 Am. Dec. 360; *Murray v. Ballou*, 1 Johns. Ch. 566, 576. And see *Miller v. Sherry*, 2 Wall. 237; *Wickliffe v. Breckenridge*, 1 Bush, 443; *Newman v. Chapman*, 2 Rand. 93; 14 Am. Dec. 766; *Goodwin v. McGehee*, 15 Ala. 232; *Waring v. Waring*, 7 Abb. Pr. 472.

the subpoena and all subsequent proceedings are set aside, the complainant being permitted to amend the subpoena so as to date it of the day the stipulation was made, the commencement of the suit is deemed to be at the time of the service of such amended subpoena.<sup>1</sup> Where service is made by publication, the service is complete after regular publication.<sup>2</sup> "It is necessary to adopt some analogous rule in those cases, where the law provides a different manner of notice. Whenever the act is done, by which the defendant is submitted to the jurisdiction of the court, it is a service of process, and the suit is commenced."<sup>3</sup> A *lis pendens* does not exist where service of a subpoena is accepted as of a prior date so as to bind a person purchasing before the time of such acceptance.<sup>4</sup> The *lis pendens* is notice of all pertinent facts stated in the pleadings.<sup>5</sup> But where an amendment is made, the notice dates from the time of the amendment.<sup>6</sup> A *lis pendens* does not exist as to facts not within the purpose of the suit.<sup>7</sup>

§ 803. **Statutory *lis pendens*.**—In England, and in most if not all of the several States, statutes have been passed requiring notices to be filed so as to affect purchasers with notice. These statutes differ in their details, some requiring more particulars to be stated than others,

<sup>1</sup> *Allen v. Case*, 13 Wis. 621.

<sup>2</sup> *Chaudron v. Magee*, 8 Ala. 570; *Hayden v. Bucklin*, 9 Paige, 511.

<sup>3</sup> *Bennet's Lessee v. Williams*, 5 Ohio, 461, 463. See *Carter v. Mills*, 30 Mo. 432; *Olevinger v. Hill*, 4 Bibb, 498.

<sup>4</sup> *Miller v. Kershaw*, 1 Bail. Eq. 479; 23 Am. Dec. 183.

<sup>5</sup> *Jones v. McNarrin*, 68 Me. 334; 28 Am. Rep. 66; *Center v. P. & M. Bank*, 22 Ala. 743; *Lockwood v. Bates*, 1 Del. Ch. 435; 12 Am. Dec. 121.

<sup>6</sup> *Jones v. Lusk*, 2 Met. (Ky.) 356; *Stone v. Connelly*, 1 Met. (Ky.) 654; 71 Am. Dec. 499; *Clarkson v. Morgan*, 6 Mon. B. 441. But see *Stoddard v. Myers*, 8 Ohio, 203; 10 Ohio St. 365.

<sup>7</sup> *Bellamy v. Sabine*, 1 De Gex & J. 566; *Tyler v. Thomas*, 25 Beav. 47. See *Stuyvesant v. Hall*, 2 Barb. Ch. 151. See, also, *Taylor v. Boyd*, 3 Ohio, 338; 17 Am. Dec. 603; *McCormick v. McClure*, 6 Blackf. 466; 39 Am. Dec. 441; *Ludlow v. Kidd*, 3 Ohio, 541; *Clarey v. Marshall*, 4 Dana, 95; *Debell v. Foxworthy*, 9 Mon. B. 228; *Gore v. Stakpoole*, 1 Dow, 31; *Earle v. Couch*, 3 Met. (Ky.) 450.

but the common object of all is to abate the rigor of the technical rule of *lis pendens* and provide a safe and effective mode of giving notice.<sup>1</sup> The effect of a *lis pendens* cannot be nullified by the fact that it has been lost from the files or has not been properly entered, through no fault of the party.<sup>2</sup> And this is true, although the party whom it is sought to bind may never have actually seen it.<sup>3</sup>

§ 804. **Effect of the statutes.**— Under these statutes, a purchaser is not affected by a *lis pendens* unless notice has been given in the manner directed by statute. “The general rule is, that one not a party to a suit is not affected by the judgment; the exception at common law is, that a *pendente lite* purchaser, though not a party was so affected; the qualification of the doctrine made by our statute is, that such purchaser is not affected unless notice of such *lis pendens* be filed with the recorder. . . . The common-law doctrine of *lis pendens* rests upon the fiction of notice to all persons of the pendency of suits, and to remedy the evils which might grow out of the transfer of apparent legal titles or rights of action to persons ignorant of litigation respecting them, this provision was inserted in

<sup>1</sup> See in England, 2 Vict. C. 1157. It is not deemed necessary to append an abstract or refer to the statutes of the different States, as the subject is connected with practice with which each attorney is familiar. But reference may be made to the following cases relating to the statutory *lis pendens*: *Abadie v. Lobero*, 36 Cal. 390; *Richardson v. White*, 18 Cal. 102; *Ault v. Gassaway*, 18 Cal. 205; *Farmers' Nat. Bank v. Fletcher*, 44 Iowa, 252; *Drake v. Crowell*, 40 N. J. L. 58; *Mills v. Bliss*, 55 N. Y. 139; *Todd v. Outlaw*, 79 N. C. 235; *Sheridan v. Andrews*, 49 N. Y. 478; *Mitchell v. Smith*, 53 N. Y. 413; *Brown v. Goodwin*, 75 N. Y. 409; *Ayrault v. Murphy*, 54 N. Y. 203; *Page v. Waring*, 76 N. Y. 463; *Fuller v. Scribner*, 76 N. Y. 190; *Majors v. Cowell*, 51 Cal. 478; *Dresser v. Wood*, 15 Kan. 344; *Leitch v. Wells*, 48 Barb. 637; *White v. Perry*, 14 W. Va. 66; *Jaffray v. Brown*, 17 Hun, 575; *Mayberry v. Morris*, 62 Ala. 113; *Tredway v. McDonald*, 51 Iowa, 663. The statutes of a State relating to *lis pendens*, it is held, does not apply to suitors except in the State courts: *Majors v. Cowell*, 51 Cal. 478.

<sup>2</sup> *Heim v. Ellis*, 49 Mich. 241.

<sup>3</sup> *Heim v. Ellis*, *supra*.

our statute. . . . We consider our statute, not as giving new rights to the plaintiff, but as a limitation upon the rights which he had before. If no *lis pendens* be filed, the party acquiring an interest or claim *pendente lite* stands wholly unaffected by the suit. If he has any rights which but for the suit, he could set up, he may still maintain those rights. But he would not be foreclosed by a judgment against the party to the suit from whom he obtained his assignment. The object of the statute evidently was to add to the common-law rule a single term, to wit, to require for constructive notice not only a suit, but filing a notice of it, so that this rule is as if it read: 'The commencement of a suit and the filing of a notice of it are constructive notice to all the world of the action, and purchasers or assignees, afterward becoming such, are mere volunteers and bound by the judgment.'<sup>1</sup> It is held in one case that a notice of *lis pendens* is not affected by the fact that it was filed several days before the commencement of the suit.<sup>2</sup> But this is denied; and it is also held that where no bill has been filed, a *lis pendens* filed is a nullity as constructive notice,<sup>3</sup> or is inoperative.<sup>4</sup>

§ 805. **Actual notice.**—As the object of these statutes is to provide a mode for giving the constructive notice which formerly was given by the commencement of the suit itself, and to prevent a party from claiming that a subsequent purchaser is affected with constructive notice unless the requirements of the statute have been complied with, it is evident that a subsequent purchaser who has *actual* notice cannot object if the statutory notice has not been filed, the filing of which was intended only to give him the notice which he already had or after-

<sup>1</sup> *Richardson v. White*, 18 Cal. 102, 106, per Baldwin, J. See *Head v. Fordyce*, 17 Cal. 149.

<sup>2</sup> *Houghton v. Mariner*, 7 Wis. 244.

<sup>3</sup> *Walker v. Hill's Executors*, 22 N. J. Eq. 514. See *Weeks v. Tones*, 16 Hun, 349.

<sup>4</sup> *Sherman v. Bemis*, 58 Wis. 343.

ward acquired. In other words, a purchaser having actual notice of the pendency of the suit is not protected by the statute.<sup>1</sup>

<sup>1</sup> *Baker v. Pierson*, 5 Mich. 456; *Sampson v. Ohleyer*, 22 Cal. 200; *Abadie v. Lobero*, 36 Cal. 390.

## CHAPTER XXIV.

### CONSIDERATION.

- § 806. Kinds of consideration.
- § 807. Support.
- § 808. Marriage.
- § 808a. Estoppel from representations in marriage negotiations.
- § 808b. Parol evidence showing marriage to be consideration.
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- § 831. Parol agreement to execute devise.
- § 832. Community property.
- § 833. In North Carolina, acknowledgment is release.
- § 834. Showing absence of consideration to defeat deed.

§ 806. Kinds of consideration.—By the elementary writers, considerations are divided into two kinds, good



and valuable. "Good considerations are those of blood, natural love, and affection, and the like." "Valuable considerations are those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained at the instance of the party promising, by the party in whose favor the promise is made."<sup>1</sup> The natural affection arising from the relationship existing between a grandfather and a grandchild is held to be a good consideration for a deed.<sup>2</sup>

§ 807. **Support.**—It was held in one case that where the only consideration expressed in a deed of bargain and sale was, that the grantee should support the grantor for his natural life, the deed was without consideration and void, because, as the deed was not executed by the grantee, there was no agreement on his part, in the opinion of the court, to support the grantor, and the deed was thus merely conditional, giving an option to the grantee to support the grantor, or to suffer it to become void by withdrawing his support.<sup>3</sup> But support of the grantor by the grantee, it may be said, is now regarded everywhere as a sufficient consideration for a deed. The grantee, by accepting the deed and entering into possession under it, becomes bound by the agreement providing for the

<sup>1</sup> Bouv. Law Dict., tit. Consideration.

<sup>2</sup> *Hanson v. Buckner's Executor*, 4 Dana, 251; 29 Am. Dec. 401; *Stovall v. Barnett*, 4 Litt. 207. But it is held otherwise in *Borum v. King's Administrator*, 37 Ala. 606. See for other examples of good considerations, *Stafford v. Stafford*, 41 Tex. 111; *Wallis v. Wallis*, 4 Mass. 135; 3 Am. Dec. 210; *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706. But a covenant to stand seised to uses on the part of a father, cannot be supported by the consideration of love and affection to an illegitimate child: *Blount v. Blount*, 2 Law Repos. (N. C.) 587; *Repos. & Taylor's Term, Law & Eq. (N. C.)*, 389. And see *Ivey v. Granberry*, 66 N. C. 224. A deed executed by a father to his daughter, in consideration of one dollar, actually paid, and natural love and affection, is not a voluntary conveyance, so as to prevent the grantee from enforcing her rights under it in equity against the grantor and his heirs, when she has taken possession and made large and expensive improvements: *Appeal of Ferguson*, 117 Pa. St. 426.

<sup>3</sup> *Jackson v. Florence*, 16 Johns. 47.

support of the grantor, and the provision for support thus becomes equivalent to a life annuity.<sup>1</sup> A deed will not be vacated because the consideration is unlawful. The court will leave the parties in the position in which it finds them.<sup>2</sup>

**§. 808. Marriage.**—Marriage is, of course, a valuable consideration for a deed. Where the grantee, under a voluntary conveyance, gains credit by the conveyance, and a third person, on account of the provisions made for her in the deed, is induced to marry her, the deed on the marriage loses its voluntary character, and is effective as against a subsequent *bona fide* purchaser for a valuable consideration.<sup>3</sup> And although the marriage may be prevented by death, a legal contract and promise of mar-

<sup>1</sup> *Hutchinson v. Hutchinson*, 46 Me. 154; *Shontz v. Brown*, 27 Pa. St. 123; *Spalding v. Hallenbeck*, 30 Barb. 292; *Exum v. Canty*, 34 Miss. 533. In *Spalding v. Hallenbeck*, *supra*, the court refer to *Jackson v. Florence*, 16 Johns. 47, and say that the cases are distinguishable, because, in the latter case, the provision for support was expressed in such language that it placed no obligation upon the grantee, while in the case of *Spalding v. Hallenbeck* there was a present agreement for support, which became binding upon the grantee by his acceptance of the deed. And see *Henderson v. Hunton*, 26 Gratt. 926; *Keener v. Keener*, 34 W. Va. 121. A promise to pay taxes and contribute to the grantor's support is a sufficient consideration for a deed: *Taylor v. Crockett*, 123 Mo. 300. See, also, *Brown v. Brown*, 44 S. O. 378.

<sup>2</sup> *Moore v. Adams*, 8 Ohio, 372; 32 Am. Dec. 723. It was held in a recent case in California, that where the consideration for a deed made by an aged woman of feeble health was her support and maintenance for the remainder of her life by the grantee, the consideration could not be specifically enforced, and hence, being insufficient in law, the deed will be canceled by a court of equity, if requested by the grantor: *Grimmer v. Carlton*, 93 Cal. 189; 27 Am. St. Rep. 171. This case is opposed by the current of authority, and cannot be regarded, in our opinion, as a precedent to be followed. The court does not discuss the question, and seems not to be aware of the authorities holding that a consideration to support and maintain the grantor is a sufficient consideration. The suit was commenced for the purpose of setting aside the deed, and the question of whether the agreement could be specifically enforced or not became immaterial. If the grantee refused to perform the agreement, the grantor was not without remedy. See § 974, *post*.

<sup>3</sup> *Verplank v. Sterry*, 12 Johns. 536; 7 Am. Dec. 348. If the grantee is innocent, the fact that the grantor may have intended a fraud upon

riage made in good faith by a woman to one who has executed a deed of land to her for the purpose of inducing her to marry him, is a valuable consideration for the deed, and she can hold the land embraced in the deed against his creditors.<sup>1</sup> In this interesting case, Merrick, J., after stating that if the marriage had taken place she would have been deemed to have been a purchaser for a valuable consideration, and would have taken a clear and indefeasible title, free and purged of any fraud against his creditors, further remarked: "And in reference to the question of the sufficiency and value of the consideration, and consequently of the validity of the title acquired by the conveyance, there does not appear to be any real and substantial distinction between a marriage formally solemnized, and a binding and obligatory agreement, which has been fairly and truly and above all suspicion of collusion made to form such connection and enter into that relation. All the consequences of a legal obligation accompany such an agreement. The law enforces its performance by affording an effectual remedy against the party who shall, without legal excuse, fail to fulfill it. But a contract of this kind is not to be regarded as a valuable consideration, merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfill it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties, and privileges of the parties. They cannot, while it exists, without a violation of good faith, as well as of the material legal obligations to which it subjects them, negotiate a contract for such alliance with any other person. A woman who has voluntarily made such an agreement cannot, without indelicacy, and so not without exposing herself to unfavorable observation, and to some loss of public favor and

his creditors will not avoid the deed: *Prewit v. Wilson*, 103 U. S. 22; *Gibson v. Bennett*, 79 Me. 302; *Tolman v. Ward*, 86 Me. 303; 41 Am. St. Rep. 556.

<sup>1</sup> *Smith v. Allen*, 5 Allen, 454; 81 Am. Dec. 758.

respect, seek elsewhere, except for good and substantial reasons for withdrawing from an engagement by which she has bound herself, for preferment in marriage; and thus her promise and agreement to marry a particular person essentially changes her condition in life. They materially affect not only her opportunities, but her right to attempt in that way to improve it. A legal contract and promise made in good faith to marry another must, therefore, like an actual marriage, be deemed to be a valuable consideration for the conveyance of an estate, and will justly entitle the grantee to hold it against subsequent purchasers, or the creditors of the grantor.”<sup>1</sup>

**§ 808 a. Estoppel from representations in marriage negotiations.**—A party who makes representations as to title to effect a marriage may be held estopped by these representations. A curious case in support of this principle occurred in New York. A father died, leaving by

<sup>1</sup> *Smith v. Allen, supra.* In a late case in California, *Connor v. Stanley*, 65 Cal. 183, a man, William Jarvis, and a woman, Mrs. J. L. Connor, had executed a contract, each promising to marry the other, and the contract further provided that “in consideration thereof, and of the mutual affection existing between them, the party of the first part grants and gives to the said party of the second part ten thousand (\$10,000) dollars’ worth of the bonds of the Natoma Water and Mining Company, a corporation duly organized under the laws of the State of California, being twenty bonds of five hundred (\$500) dollars each, made payable to bearer, now in the possession of the party of the first part, all of which he promises to deliver to her, the party of the second part, on or before the day of their said marriage, to be and become her own absolute property in her own name as her separate estate.” Mrs. Connor was always ready to fulfill her part of the agreement, but Jarvis refused to marry, and continued his refusal down to the time of his death. After Jarvis’ death, Mrs. Connor presented a verified claim to the administrator of his estate, and this being rejected, brought suit for the value of the bonds. The court below took the view that the contract of Jarvis was a mere promise to deliver the bonds upon the marriage of the parties within a reasonable time. But the supreme court held this to be error. The court held that the agreement was an antenuptial settlement, the consequences of which Jarvis could not avoid by refusing to consummate the marriage. Upon his refusal, after a reasonable time, to marry her, she was entitled to the bonds. It became his duty to seek her in marriage, not hers to seek him. And see, also, *Whelan v. Whelan*, 3 Cowen, 537; *Ellinger v. Crowl*, 17 Md. 361.

will a farm to two sons, James and Frederick, and subject to the limitation in the case of Frederick, that if he should die without issue, the portion of the estate devised to him should vest in James and his heirs. Frederick conveyed his interest in the land to one Hoard, and the latter, subsequently, sought one Catharine Hogel for the purpose of bringing about a marriage between her and Frederick. For the purpose of persuading her to marry Frederick, Hoard falsely and fraudulently represented to her that Frederick had a piece of fine property, and that if she married and had an heir the land would go to the heir. Induced by these representations Catharine did marry Frederick, and the result of the marriage was a daughter. Shortly after the birth of this daughter, the farm was partitioned between James and Hoard, the grantee of Frederick. The object of Hoard in bringing about the marriage was to fulfill the condition in the will that if Frederick had issue, he should obtain the fee; otherwise he would possess only a life estate, and the birth of a child, vesting the fee in Frederick, would make Hoard's title perfect. The daughter commenced an action praying that she be declared the owner of the farm set off in partition to Hoard. The latter, while admitting that he procured the fee of the farm through the marriage, claimed that the daughter had no right of action against him because of a lack of privity, and that she was not induced to any action by reason of his fraud and sustained no legal damage from it. The court held, however, that Hoard held the land in trust for her. Mr. Justice Peckham who delivered the opinion of the court observed: "It is true, her own action was in nowise influenced by these representations, for she was not then born. But where, in the peculiar and anomalous rules, obtaining in that branch of the law, regarding marriage, marriage settlements, and frauds in relation thereto, a marriage is induced under circumstances such as exist in this case, we think there is no trouble in holding the defendant bound by his representations, and that in the

character of a trustee *ex maleficio*, he shall be held to make good the thing to the person who would have the property if the fact were as he represented it, assuming such person to be the fruit of the marriage brought about by those very representations.<sup>1</sup>

**§ 808 b. Parol evidence showing marriage to be consideration.**—Although the deed may recite that it is based upon a pecuniary consideration, it may be shown by parol evidence that marriage was the true consideration.<sup>2</sup> Where it is recited in a deed that the consideration is the promise of the grantee to marry the grantor, and the deed is drafted by the grantee and transmitted to the grantor for execution, a written memorandum of the contract of marriage signed by the grantee is not necessary.<sup>3</sup>

**§ 808 c. Grantor's intention to defraud creditors where deed is made in consideration of marriage.**—If the grantee is unaware at the time that the grantor intends to defraud his creditors, her knowledge of this fact before she complies with her contract of marriage will not be sufficient to avoid the deed. The consideration for the deed is not the actual consummation of the marriage, but the agreement to marry.<sup>4</sup> If the grantee is innocent, the deed is valid, and it is immaterial whether or not the grantor intended a fraud upon his creditors. The fact that he did intend such a fraud will not avoid the deed.<sup>5</sup> Marriage is regarded in law as the highest and most valuable of considerations, and the grantee, when free from fraud, in as secure a position as though she had paid in money the full value of the property. Hence, where a father conveys land to his daughter upon the express consideration of her marriage, which was an

<sup>1</sup> Piper v. Hoard, 107 N. Y. 73; 1 Am. St. Rep. 789.

<sup>2</sup> Tolman v. Ward, 86 Me. 303; 41 Am. St. Rep. 556.

<sup>3</sup> Prignon v. Daussat, 4 Wash. 199; 31 Am. St. Rep. 914.

<sup>4</sup> Prignon v. Daussat, 4 Wash. 199; 31 Am. St. Rep. 914.

<sup>5</sup> Prewit v. Wilson, 103 U. S. 22; Gibson v. Bennett, 79 Me. 302; Tolman v. Ward, 86 Me. 303; 41 Am. St. Rep. 556.

inducement for the conveyance, and she accepts the deed without knowing or suspecting any fraud, and the deed is made by the grantor without any intent to defraud his creditors, believing he is fully able to pay them, the deed is valid against the grantor's creditors, although, at the time when he executed the deed, he was, in fact, insolvent.<sup>1</sup>

**§ 809. Other valuable considerations.**—Valuable considerations are of numerous kinds, though most frequently they are either money or marriage. It is not intended to refer to every consideration that the courts have declared to be valuable, but it may be worth while to call attention to a few as illustrations. A sufficient consideration to support a deed may consist of an agreement to do a thing, even though, as a matter of fact, the agreement is never performed. If a purchaser from the grantee under such a deed believes that the agreement will not support a deed and that it will not be performed, this does not make his purchase fraudulent or invalidate his title.<sup>2</sup> If a person having a wife living seduces an innocent woman by a pretended marriage, the injured party is entitled to compensation in money, and such right to compensation is a valuable consideration for a deed.<sup>3</sup> Where

<sup>1</sup> *Cohen v. Knox*, 90 Cal. 266. Generally, to avoid a deed on the ground of fraud, it must be shown that the grantee was aware of the fraud: *Cooke v. Cooke*, 43 Md. 522; *Mehlhop v. Pettibone*, 54 Wis. 652; *Hopkins v. Langton*, 30 Wis. 379; *Curtis v. Valliton*, 3 Mont. 187; *Preston v. Turner*, 36 Iowa, 671; *Clements v. Moore*, 6 Wall. 312; *Rea v. Missouri*, 17 Wall. 543; *Miller v. Bryan*, 3 Iowa, 58; *Hall v. Arnold*, 15 Barb. 600; *Steele v. Ward*, 25 Iowa, 535; *Partelo v. Harris*, 26 Conn. 480; *Bancroft v. Blizzard*, 13 Ohio, 30; *Chase v. Walters*, 28 Iowa, 460; *Violett v. Violett*, 2 Dana, 323; *Howe Machine Co. v. Olaybourn*, 6 Fed. Rep. 441; *Kittredge v. Sumner*, 11 Pick. 50; *Fifield v. Gaston*, 12 Iowa, 218; *Byrne v. Becker*, 42 Mo. 464; *McCormick v. Hyatt*, 33 Ind. 546; *Kellogg v. Aherin*, 48 Iowa, 299; *Leach v. Francis*, 41 Vt. 670; *Drummond v. Couse*, 39 Iowa, 442; *Ewing v. Runkle*, 20 Ill. 448; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Jeager v. Kelley*, 52 N. Y. 274; *Ruhl v. Phillips*, 48 N. Y. 125; 8 Am. Rep. 522.

<sup>2</sup> *Gray v. Lake*, 48 Iowa, 505; *Lake v. Gray*, 35 Iowa, 459.

<sup>3</sup> *Doe v. Horn*, 1 Ind. 363; 50 Am. Dec. 470. And in such case the title of the grantee will be valid, although the grantor may thereby intend to



a deed made on the consideration of future illicit intercourse between the grantor and grantee is fully executed and delivered, the title is vested in the grantee.<sup>1</sup> A covenant to render personal services to the grantor is a valuable consideration, and is sufficient to support a bargain and sale deed.<sup>2</sup> The benefit to other lands of the grantor to result from the use to be made of those conveyed to the grantee, is a valuable consideration.<sup>3</sup> An assignment of a part interest in a bond for title is a sufficient consideration.<sup>4</sup> A deed was held to be a good bargain and sale deed where no amount was mentioned, but it was recited that the deed was made for "a certain sum in hand paid";<sup>5</sup> so where the deed recites that it is made "for value received."<sup>6</sup>

**§ 810. Deeds of bargain and sale and covenants to stand seised.**—To give effect to a deed under the statute of uses as a deed of bargain and sale or a covenant to stand seised to uses, it is essential that there should be a consideration. A valuable consideration is necessary for the operation of a deed of bargain and sale.<sup>7</sup> And however small the

defraud his creditors, if the grantee has no knowledge of such intention: *Doe v. Horn, supra.*

<sup>1</sup> *Hill v. Freeman*, 73 Ala. 200; 49 Am. Rep. 48.

<sup>2</sup> *Young v. Ringo*, 1 Mon. 30. See, also, *Bussey v. Reese*, 38 Md. 266; *McMahan v. Morrison*, 16 Ind. 172; 79 Am. Dec. 418; *Gale v. Coburn*, 18 Pick. 397; *McWhorter v. Wright*, 5 Ga. 555; *Cheney v. Watkins*, 1 Har. & J. 527; 2 Am. Dec. 530.

<sup>3</sup> *Jackson v. Pike*, 9 Cowen, 69. The reservation of rent in a lease is a sufficient consideration for a stipulation that the lessor will convey at a fixed price upon the expiration of the term: *Gastin v. Union School District of Bay City*, 94 Mich. 502; 34 Am. St. Rep. 361. See, also, *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526; *Harding v. Gibbs*, 125 Ill. 85; 8 Am. St. Rep. 345.

<sup>4</sup> *Cannon v. Young*, 89 N. C. 264.

<sup>5</sup> *Jackson v. Schoonmaker*, 2 Johns. 230.

<sup>6</sup> *Jackson v. Alexander*, 3 Johns. 484; 3 Am. Dec. 517. The erection and maintenance of a railway station is a valuable consideration for a deed: *Louisville, New Orleans etc. Ry. Co. v. Blythe*, 69 Miss. 939; 30 Am. St. Rep. 599.

<sup>7</sup> *Boardman v. Dean*, 34 Pa. St. 252; *Jackson v. Sebring*, 16 Johns. 515; 8 Am. Dec. 357; *Jackson v. Florence*, 16 Johns. 46; *Gault v. Hall*, 26

pecuniary consideration may be, it is sufficient to support a deed of bargain and sale.<sup>1</sup> A covenant to stand seised is supported by a good consideration.<sup>2</sup> It is not essential, however, that such consideration should be expressed in the deed. If it actually exists, the deed will be supported as a covenant to stand seised.<sup>3</sup> A deed recited that in consideration of three thousand dollars paid by the grantee, the grantor gave, granted, sold, and conveyed to him certain land, the grantor reserving the right to use and occupy during his natural life, free of rent, the property so granted. The grantee had married the daughter of the grantor, but she had died before the execution of the deed. But she had left children who were alive at the time of the execution of the deed. It was held that under the technical rule forbidding the creation of a freehold estate to commence *in futuro*, the deed if regarded as a feoffment or bargain and sale was void; but that the consanguinity existing between the grantor and his grandchildren, was a sufficient consideration for a covenant to stand seised to uses, and that such consideration might be averred and proved although one entirely different was set forth in the deed, and the deed did not allude to such consanguinity. The deed as a covenant to stand seised was consequently held to vest the title in the grantee, subject to the life estate of the grantor.<sup>4</sup> So in regard to a deed of bargain and sale, it may be operative, notwithstanding no pecuniary consideration is expressed in the deed, as it may be proved *aliunde*.<sup>5</sup> The recital in the

Me. 561; *Jackson v. Delancey*, 4 Cowen, 427; *Chiles v. Coleman*, 2 Marsh. A. K. 296; 12 Am. Dec. 396.

<sup>1</sup> *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706. See *Corwin v. Corwin*, 6 N. Y. 342; 57 Am. Dec. 453.

<sup>2</sup> *Green v. Thomas*, 11 Me. 321; *Rollins v. Riley*, 44 N. H. 11; *Wallis v. Wallis*, 4 Mass. 135; 3 Am. Dec. 210. But see *Trafton v. Hawes*, 102 Mass. 533; 3 Am. Rep. 494; *Jackson v. Cadwell*, 1 Cowen, 639.

<sup>3</sup> *Wallis v. Wallis*, 4 Mass. 135; 3 Am. Dec. 210; *Brewer v. Hardy*, 22 Pick. 380; 33 Am. Dec. 747.

<sup>4</sup> *Gale v. Coburn*, 18 Pick. 397. But see *Jackson v. Delancey*, 4 Cowen, 427; *Jackson v. Cadwell*, 1 Cowen, 639.

<sup>5</sup> *Jackson v. Dillc*, 2 Over. 261; *Perry v. Price*, 1 Mo. 553; *Den v.*

deed that a pecuniary consideration has been paid, so far as the legal effect of the conveyance as a deed of bargain and sale is concerned, is conclusive. By this is meant simply the effect of the deed aside from any question of fraud.<sup>1</sup>

**§ 811. Consideration of paying grantor's debts.**—If an owner of land execute a deed on the consideration that the grantee shall pay all the debts of the grantor, the grantee, although he does not execute the deed, yet if he accepts the deed and takes possession of the lands, is bound personally for the payment of the debts of the grantor, and a court of equity will subject the land to the payment of such debts.<sup>2</sup> Though a part of the consideration fail, there will be no apportionment where a part of it is good.<sup>3</sup>

**§ 812. Trust to distribute estate according to will.**—A deed reciting that the grantor was aged and infirm, and at times unable to give attention to his business, and that in anticipation of his incapacity and of a sum of money, he conveyed his estate in trust for the use of himself for life, and at his death to be distributed accord-

Hanks, 5 Ired. 30. See *Ruth v. Ford*, 9 Kan. 17; *Jackson v. Alexander*, 3 Johns. 484; 3 Am. Dec. 517.

<sup>1</sup> *Rockwell v. Brown*, 54 N. Y. 210; *Hatch v. Bates*, 54 Me. 136; *Jones v. Dougherty*, 10 Ga. 273; *Trafton v. Hawes*, 102 Mass. 541; 3 Am. Rep. 494; *Jones v. Dougherty*, 10 Ga. 273; *Hartshorn v. Day*, 19 How. 211. And see *Winans v. Peebles*, 31 Barb. 371; *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *Hallocher v. Hallocher*, 62 Mo. 267; *Kerr v. Birnie*, 25 Ark. 225; *Lake v. Gray*, 35 Iowa, 461; *Randall v. Ghent*, 19 Ind. 271; *Barker v. Koneman*, 13 Cal. 9.

<sup>2</sup> *Vanmeter's Executors v. Vanmeters*, 3 Gratt. 148. See *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562.

<sup>3</sup> *Wilson v. Webster*, Morris, 312; 41 Am. Dec. 230. See as to declarations of grantor as part of the *res gestæ* to prove consideration, *Sutton v. Reagan*, 5 Blackf. 217; 33 Am. Dec. 466. Signing a note as a surety is a valid consideration: *Grigsby v. Schwartz*, 83 Cal. 278. A deed is supported by a valuable consideration where the grantee discharges a debt due to him by a third person to whom his grantor is indebted in an equal amount, and the claim against the grantor is canceled: *Smith v. Westall*, 76 Tex. 509.

ing to the provisions of his will before made, is supported by a sufficient consideration. It passes the legal title to the trustees, and cannot be revoked.<sup>1</sup>

**§ 813. Valuable consideration as protection to bona fide purchasers.**—In order that a person may claim that he occupies the position of a *bona fide* purchaser, when questions arise as to the priority of two or more titles or claims to the same property, it is essential as one of the facts giving him this character that he has acquired his right for a valuable consideration. A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term "*bona fide* purchaser."<sup>2</sup> To enable the grantee to claim protection as a *bona fide* purchaser he must have parted with something possessing an actual value, capable of being estimated in money, or he must on the faith of the purchase have changed, to his detriment, some legal position that he before had occupied.<sup>3</sup>

<sup>1</sup> *Turner v. Turner*, 1 Mon. 243. A deed reserving a life estate in the grantor is not void for want of consideration where land is conveyed pursuant to a request by a person desirous of devising to the grantor only a life estate with remainder to the grantee without changing his will: *Jenkins v. Adcock*, 5 Tex. Civ. App. 466.

<sup>2</sup> *Swan v. Legan*, 1 McCord Eq. 227; *Morse v. Wright*, 60 Cal. 260; *Upshaw v. Hargrove*, 6 Smedes & M. 286; *Roseman v. Miller*, 84 Ill. 297; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Aubuchon v. Bender*, 44 Mo. 560; *Bowen v. Prout*, 52 Ill. 354; *Boon v. Barnes*, 23 Miss. 136; *Frost v. Beekman*, 1 Johns. Ch. 288; *Patten v. Moore*, 32 N. H. 382; *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314; *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71.

<sup>3</sup> *Union Canal Co. v. Young*, 1 Whart. 410; 30 Am. Dec. 212; *Spurlock v. Sullivan*, 36 Tex. 511; *Webster v. Van Steenbergh*, 46 Barb. 211; *Haughwout v. Murphy*, 21 N. J. Eq. (6 Green, C. E.) 118; *Reed v. Gannon*, 3 Daly, 414; *Pickett v. Barron*, 29 Barb. 505; *Penfield v. Dunbar*, 64 Barb. 239; *Roxborough v. Messick*, 6 Ohio St. 448; 67 Am. Dec. 346; *McLeod v. Nat. Bank*, 42 Miss. 99; *Dickerson v. Tillinghast*, 4 Paige, 215; 25 Am. Dec. 528; *Williams v. Shelly*, 37 N. Y. 375; *Delancey v. Stearns*, 66 N. Y. 157; *Lawrence v. Clark*, 36 N. Y. 128; *Weaver v. Barden*, 49 N. Y. 286; *Brown v. Welch*, 18 Ill. 343; 68 Am. Dec. 549; *Keys v. Test*, 33 Ill. 316; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62; *Westbrook v. Gleason*, 79 N. Y. 23, 36; *Cary v. White*, 52 N. Y. 138; *Palmer v. Williams*, 24 Mich. 328; *Seward v. Jackson*, 8 Cowen, 406, 430; *Story v. Lord Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk.

§ 814. **Adequacy of consideration.**—Where the deed is taken in good faith, the amount of the consideration paid is immaterial.<sup>1</sup> But it is held that a payment in confederate money is not a valuable consideration, and that a grantee paying for the land in such money cannot be regarded as a *bona fide* purchaser for a valuable consideration.<sup>2</sup> But the consideration paid may be so small and inadequate as to justify a suspicion of fraud. It is said “that in order to protect himself against the claim of a prior donee, or of a creditor, the party assuming to be a purchaser for a valuable consideration, must prove a fair consideration, not up to the full value, but a price paid which would not cause surprise, or make anyone exclaim, ‘he got the land for nothing, there must have been some fraud or contrivance about it!’”<sup>3</sup> Where all the circumstances attending the transaction show that the grant was intended as a gift, the fact that the grantee actually paid a merely nominal consideration in money will not cause him to be treated as a purchaser for a valuable consideration within the meaning of the recording laws, and he is not entitled to priority over a prior unrecorded deed.<sup>4</sup>

304; *Tourville v. Naish*, 3 P. Wms. 306; *Baggarly v. Gaither*, 2 Jones Eq. 80; *Bowen v. Prout*, 52 Ill. 354; *Gerson v. Pool*, 31 Ark. 85; *Keirsted v. Avery*, 4 Paige, 9; *Glidden v. Hunt*, 24 Pick. 221; *Conard v. Atlantic Ins. Co.*, 1 Peters, 386; *Curtis v. Leavitt*, 15 N. Y. 11.

<sup>1</sup> See *Seward v. Jackson*, 8 Cowen, 406, 430; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62; *Pickett v. Barron*, 29 Barb. 505; *Cary v. White*, 52 N. Y. 138.

<sup>2</sup> *Sutton v. Sutton*, 39 Tex. 549; *Willis v. Johnson*, 38 Tex. 303.

<sup>3</sup> *Worthy v. Caddell*, 76 N. C. 82, 86. Where an attack is made upon an executed conveyance, the fact that the consideration is grossly inadequate can be regarded only as evidence of fraud, and of itself is not sufficient to set it aside: *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81.

<sup>4</sup> *Ten Eyck v. Witbeck*, 135 N. Y. 40; 31 Am. St. Rep. 809. In that case the owner of a farm of the value of twenty thousand dollars had conveyed it to his wife, and six years afterward conveyed it to his daughter. The deed to the daughter stated that it was made in consideration of the sum of ten dollars, and the payment of the entire net proceeds of the farm to the grantor annually during his lifetime, and one-third of such proceeds to his wife in case she survived him, one-third to another daughter for the same length of time, and provided for disposing of the proceeds in a specified way in other contingencies, and the

§ 815. **Antecedent debts as consideration.**—On the question of whether an antecedent debt can be a valuable consideration, so as to enable the grantee to claim the benefit of being a *bona fide* purchaser, there has been a wide difference of opinion. In many cases there have been other circumstances to be looked to besides the antecedent debt in determining whether the grantee is a purchaser for value. There may be on the part of the grantee a forbearance from suing, from enforcing a legal right, which is in contemplation of law, in many instances, a sufficient consideration to support a transfer. Where the creditors of an owner of land encumbered with a vendor's lien for the purchase money, took a deed from him without advancing any new consideration as security for the debts of the owner contracted prior to his purchase of the land from his vendor, the title of the creditors, it was held, was subject to the lien of the vendor.<sup>1</sup> It is said by Denio, J., that, "Where a conveyance

deed also gave power to the grantee to sell the property after the grantor's death. The second deed was recorded first, but in an action of ejectment, it was held to be no bar to an action of ejectment by those claiming under the first deed. The court said: "We deem it unnecessary to undertake to determine here what degree of adequacy of price is required to uphold a subsequent deed first recorded. Upon this branch of the case we have no occasion to go, further than to hold that a small sum, inserted and paid perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid, will not of itself satisfy the terms of the statute, where it appears upon the face of the conveyance, or by other competent evidence, that it was not the actual consideration." The court states that the cases of *Fullenwider v. Roberts*, 4 Dev. & B. 27; *Worthy v. Caddell*, 76 N. C. 82; *Upton v. Bassett Cro. Eliz.* 445; *Doe v. Routledge, Cowp.* 705, and *Metcalf v. Pulvertoft*, 1 Ves. & B. 183, in so far as they hold that a purely nominal consideration is insufficient to protect an innocent purchaser, are in harmony with the views expressed by the court, and that so far as the cases of *Webster v. Van Steenburgh*, 46 Barb. 211, and *Hendy v. Smith*, 49 Hun, 510, hold a contrary doctrine, they do not meet with the approval of the court. It is held that where property worth eight hundred dollars is sold for two hundred dollars, the inadequacy of consideration will not avoid the deed: *Feigley v. Feigley*, 7 Md. 537; 61 Am. Dec. 375.

<sup>1</sup> *Johnson v. Graves*, 27 Ark. 557. The court, per Stephenson, J., said: "The object of the law in all questions arising between vendor and vendee respecting the equitable lien of the former, is to give the ven-

is made, or a security taken, the consideration of which was an antecedent debt, the grantee or party taking the security is not looked upon as a *bona fide* purchaser. The expression in the statute is borrowed from the language of courts of equity, and must be interpreted in the sense in which it is there understood; and it is well settled that a grantee or encumbrancer who does not advance anything at the time, takes the interest conveyed, subject to any prior equity attaching to the subject."<sup>1</sup> In a

dor the benefit of his lien as against the vendee and those holding under him having notice of the lien, but to save him harmless whose money has been advanced in good faith without this notice, and upon the vendor's declaration in his deed. Let us apply this principle to the case at the bar. The vendee, Bell, executes to Johnson his deed of trust, to secure certain of his creditors, which debts he had contracted prior to his purchase of the land from Graves. This deed, at most, gives but an equitable title to Bell's creditors, and which they must proceed to execute before they can gain the legal title. They have by taking this security in nowise impaired Bell's liability to them, but would have all the remedy, after taking this security, they had before. Nor are they in worse condition by giving the vendor, Graves, priority over them than they were when they gave Bell the credit. If they had taken the land in satisfaction of the debt, or had made advances *upon the faith of the title* as it appeared of record, they would have occupied a different attitude in the case; but where creditors of the vendee take a conveyance from him merely as security for their antecedent debts, without advancing any new consideration, they are postponed to the rights of the vendor: 2 Wash. Real Prop. (2d ed. 89); *Brown v. Vanlier*, 7 Humph. 249; *Harris v. Horner*, 1 Dev. & B. Eq. 455; 30 Am. Dec. 182; *Eubanks v. Poston*, 5 Mon. 286; *McGown v. Yerks*, 6 Johns. Ch. 450; *Chance v. McWhorter*, 26 Ga. 315; *Repp v. Repp*, 12 Gill & J. 341; *Dickinson v. Tillinghast*, 4 Paige, 215; 25 Am. Dec. 528."

<sup>1</sup> In *Wood v. Robinson*, 22 N. Y. 564, 567. And see, also, in support of this view or relating to it, *Cary v. White*, 52 N. Y. 138; *Craft v. Russell*, 67 Ala. 9; *Mingus v. Condit*, 23 N. J. Eq. (8 Green, C. E.) 313; *Sweeney v. Bixler*, 69 Ala. 539; *Halstead v. Bank of Kentucky*, 4 Marsh. J. J. 554; *Ashton's Appeal*, 73 Pa. St. 153; *Metrop. Bank v. Godfrey*, 23 Ill. 579; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Pancoast v. Duval*, 26 N. J. Eq. 445; *Upshaw v. Hargrove*, 6 Smedes & M. 286; *Morse v. Godfrey*, 3 Story, 364; *Alexander v. Caldwell*, 55 Ala. 517; *Gafford v. Stearns*, 51 Ala. 434; *Boon v. Barnes*, 23 Miss. 136; *Wheeler v. Kirtland*, 24 N. J. Eq. 552; *Short v. Battle*, 52 Ala. 456; *Padgett v. Lawrence*, 10 Paige, 170; 40 Am. Dec. 232; *Haynsworth v. Bischoff*, 6 Rich. 159; *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480; *Weaver v. Barden*, 49 N. Y. 286; *Thurman v. Stoddard*, 63 Ala. 336; *Jones v. Robinson*, 77 Ala. 499; *Wells v. Morrow*, 38 Ala. 125; *Spurlock v. Sullivan*, 36 Tex. 511; *Swen-*



case in Kansas, the rule that a party who takes a deed in payment of a pre-existing debt is not a *bona fide* purchaser, is held to be applicable only where the property is purchased from an apparent owner, but who is not such, in fact, or not in law or equity the real owner, and not applicable where the purchaser takes the property in good faith from the true owner, in consideration of the relinquishment of a pre-existing debt.<sup>1</sup>

§ 816. **The other view.**—In California, it is held that where a mortgage is given as security for a pre-existing debt, the mortgagee is a purchaser for a valuable consideration within the meaning of the registry acts, giving priority to the one whose conveyance is first recorded.<sup>2</sup> In a case in Mississippi, the court said: "It is now well settled that if a party take a security or specific property in satisfaction and discharge of a pre-existing debt, which is thereby extinguished, he is a *bona fide* purchaser, and not affected by previous equities."<sup>3</sup> And likewise in

son v. Seale (Tex. Civ. App., May 9, 1894), 28 S. W. Rep. 143; Overstreet v. Manning, 67 Tex. 657; 4 S. W. Rep. 448; Steffian v. Bank, 69 Tex. 513; 6 S. W. Rep. 823; Golson v. Fielder, 2 Tex. Civ. App. 400; 21 S. W. Rep. 173; Phelps v. Fockler, 61 Iowa, 340; 14 N. W. Rep. 729; 16 N. W. Rep. 210; Koon v. Tramel, 71 Iowa, 132; 32 N. W. Rep. 243; Edwards v. McKernan, 55 Mich. 520; 22 N. W. Rep. 20; Boxheimer v. Gunn, 24 Mich. 372; Moore v. Ryder, 65 N. Y. 438; Wood v. Robinson, 22 N. Y. 564; Dickerson v. Tillinghast, 4 Paige, 215; 25 Am. Dec. 528; Weaver v. Barden, 49 N. Y. 286; De Lancey v. Stearns, 66 N. Y. 157.

<sup>1</sup> Ruth v. Ford, 9 Kan. 17.

<sup>2</sup> Frey v. Clifford, 44 Cal. 335. And see, as to commercial paper, Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94; Nagle v. Lyman, 14 Cal. 450. And see, generally, Work v. Brayton, 5 Ind. 396; Coddington v. Bay, 20 Johns. 637; 11 Am. Dec. 342; Lawrence v. Clark, 36 N. Y. 128; Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' Bank, 25 N. Y. 143; 82 Am. Dec. 331; Mobile Life Ins. Co. v. Randall, 71 Ala. 220.

<sup>3</sup> Love v. Taylor, 26 Miss. 567, 574, and cases cited. See, also, Wert v. Naylor, 93 Ind. 431; Heath v. Silverthorn, 39 Wis. 416; Chaffee v. Atlas Lumber Co., 43 Neb. 224; 47 Am. St. Rep. 758; Wright v. Bundy, 11 Ind. 398; Babcock v. Jordan, 24 Ind. 14; Doolittle v. Cook, 75 Ill. 354; Royer v. Keystone Nat. Bank, 83 Pa. St. 248; Cummings v. Boyd, 83 Pa. St. 372; Busey v. Reese, 38 Md. 264; Cecil Bank v. Heald, 25 Md. 562; Jackson v. Reid, 30 Kan. 10; 1 Pac. Rep. 308; Ruth v. Ford, 9 Kan. 17; Haynes

Alabama, where a creditor takes an absolute deed in payment of a pre-existing debt, he becomes a purchaser for a valuable consideration entitled to the protection of the registry acts.<sup>1</sup> But if the indebtedness is not satisfied, and the creditor takes a mortgage as security for its payment, he is not such *bona fide* purchaser, and, if the consideration be partly an old debt, and partly one created at the time, he will be protected only to the extent of the new debt.<sup>2</sup>

§ 817. **Presumption that deed states true consideration.**—The statement in the deed that a certain sum has been paid as the consideration is an admission or acknowledgment of the grantor that such is the fact, and such statement may be accepted as *prima facie* evidence of its truth.<sup>3</sup> Hence, where a person has the title vested in him, and executes a deed reciting a valuable consideration, it is never necessary as against him, or those claiming under him, or as against a stranger, to show what reason, other than the grantor's, will lead him to execute it.<sup>4</sup> "A deed of itself imports a consideration. The recital of a consideration is conclusive for the purpose of supporting the deed against the grantor and his heirs. A voluntary conveyance or gift to a stranger is good against the grantor and his heirs. It is also good against a subsequent purchaser for value in the absence of actual fraud."<sup>5</sup>

§ 818. **Presumption as against strangers—Conflict in the decisions—Comments.**—While there can be no doubt

*v. Eberhardt*, 37 Kan. 308; 15 Pac. Rep. 168; *Lawrence v. Tucker*, 23 How. 14; *Shirras v. Craig*, 7 Cranch, 34; *Conrad v. Atlas Ins. Co.*, 1 Pet. 386; *Soule v. Shotwell*, 52 Miss. 236.

<sup>1</sup> *Saffold v. Wade's Executor*, 51 Ala. 214; *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 866.

<sup>2</sup> *Wells v. Morrow*, 38 Ala. 125.

<sup>3</sup> *Belden v. Seymour*, 8 Conn. 310; 21 Am. Dec. 661; *Barter v. Greenleaf*, 65 Me. 405; *Bayliss v. Williams*, 6 Cold. 440; *Clements v. Landrum*, 26 Ga. 401.

<sup>4</sup> *Rockwell v. Brown*, 54 N. Y. 210.

<sup>5</sup> *Wells, J.*, in *Trafton v. Hawes*, 102 Mass. 533, 541, 3 Am. Rep. 494, citing *Beal v. Warren*, 2 Gray, 447.

that as against the grantor himself and his heirs, the acknowledgment in the deed that a certain consideration has been paid is *prima facie* evidence of the truth of the fact recited, yet when it comes to apply this rule to strangers, the reasons on which it is founded when applied to the grantor do not so forcibly, if at all, appear. A distinction can well be drawn between the effect as evidence of a statement made by the grantor when he alone is affected by its truth or falsity, and the effect of such statement when the rights of others are involved. In some courts no distinction is made between the parties themselves and strangers as to the *prima facie* evidence of the recital acknowledging the payment of the consideration. In others, this rule is confined in its application to cases affecting the parties only, and its existence when applied to strangers strenuously denied. It is thought that this subject is of sufficient importance to warrant a somewhat fuller discussion than the mere statement that in some States the one view prevails, and in others the opposite. Hence, in the following sections will be found instances in which each view of the law has by different courts been taken.

**§ 819. Decisions that the rule applies to strangers.—** In some of the States the rule is applied not only to parties, but to strangers also. As an instance we may cite the case where an owner of land conveyed it to an infant, reciting in the deed that the consideration had been paid by such infant. A judgment creditor of the father of the infant caused the land to be sold on execution on his judgment, alleging that the father had paid the consideration, and had caused the deed to be made to his child for the purpose of defrauding his creditors, and that thereby he had a resulting trust in the land which could be sold under execution. The court held that the recital of the payment of the consideration by the infant was *prima facie* evidence of this fact, and that the party attacking the deed must show by clear and satisfactory evi-

dence the falsity of this recital.<sup>1</sup> An owner of land conveyed the same to one person, and before the registration of the deed conveyed the same land to another, who caused his deed to be first placed on record. The latter, if he had taken his deed without notice of the execution of the prior one, and had paid the consideration, would, of course, have the better title, and the court held that the recital in his deed of the payment of the consideration was evidence of such fact as between him and the prior grantee.<sup>2</sup> So in another case an owner of land conveyed it by deed, and the grantee executed a mortgage to his grantor to secure the payment of the purchase price. Before the mortgage was recorded, the grantee sold the land to another, the deed reciting that a consideration of a certain amount had been paid. In the contest for priority between the first grantor, and also mortgagor, and the second grantee, upon the issue whether the latter was a purchaser in good faith and for value, it was decided that the recital in the deed of payment of the consideration was evidence of such payment.<sup>3</sup> "The acknowledgment in a deed of the receipt of the consideration money," said Sutherland, J., speaking for the court, "is *prima facie* evidence of its payment. It is equivalent to, and like a receipt for money. It is liable to be explained or contradicted; but, until impeached, it is legal and competent evidence of payment. Nor is its operation confined to the immediate parties to the deed. It does not operate by way of estoppel, but as evidence merely, and must have the effect of sustaining the deed

<sup>1</sup> *Gaugh v. Henderson*, 2 Head, 628. But in the subsequent case of *Bayliss v. Williams*, 6 Cold. 445, the same court said that this point did not seem to have been carefully discussed or considered.

<sup>2</sup> *Wood v. Chapin*, 13 N. Y. (3 Kern.) 509; 67 Am. Dec. 62. Where a bargain and sale deed recites a consideration a *prima facie* case is made sufficient to support a verdict in favor of the grantee as against the grantor's heirs where there is no evidence to overcome it: *Mowry v. Mowry*, 103 Cal. 314.

<sup>3</sup> *Jackson v. McChesney*, 7 Cowen, 360; 17 Am. Dec. 521, and cases cited.

by establishing, *prima facie*, the consideration for which it was given, against any person who may seek collaterally to impeach it.”<sup>1</sup>

§ 820. **Decisions that the rule does not apply to strangers.**—In a case in New Hampshire, a deed which purported to have been executed upon a pecuniary consideration, and which acknowledged the receipt of its payment, was attacked by a creditor as being fraudulent against existing creditors of the vendee. The court held that the recital of the payment of the consideration was not evidence of the fact as against such creditors.<sup>2</sup> In a

<sup>1</sup> Jackson v. McChesney, *supra*. See, also, Medley v. Mask, 4 Ired. Eq. 339; Cocke v. Trotter, 10 Yerg. 213; Whitbeck v. Whitbeck, 9 Cowen, 266; 18 Am. Dec. 503; Hayward's Heirs v. Moore, 2 Humph. 584; West Portland Homestead Assn. v. Lawnsdale, 19 Fed. Rep. 291; Galland v. Jackman, 26 Cal. 79; 85 Am. Dec. 172; Long v. Dollarhide, 24 Cal. 218. See Gillan v. Metcalf, 7 Cal. 137.

<sup>2</sup> Kimball v. Fenner, 12 N. H. 248. Parker, C. J., in delivering the opinion of the court, said: “The question may be stated, then, in other words, whether a deed, which purports to be executed upon a pecuniary consideration, and contains an acknowledgment of the receipt of it, furnishes of itself evidence that such consideration was in fact received, or whether, as against existing creditors, it is not to be regarded as a mere voluntary conveyance, and presumed to be fraudulent until some evidence is offered of the consideration upon which it was executed. There is no doubt that the clause acknowledging the receipt of a consideration furnishes evidence against the grantor that the consideration specified has been paid, and this receipt, being under seal, and part of the deed itself, cannot be contradicted by him for the purpose of defeating the instrument: Morse v. Shattuck, 4 N. H. 229; 17 Am. Dec. 419. But, for all other purposes, the effect of this clause, even between the parties, is that of a mere receipt, which may be contradicted; and it furnishes the grantee, therefore, only *prima facie* evidence of the consideration upon which the deed is founded. Thus, it may be shown that the actual consideration was more than that expressed: Belden v. Seymour, 8 Conn. 304; 21 Am. Dec. 661; or less: Morse v. Shattuck, 4 N. H. 229; 17 Am. Dec. 419; or that it was iron instead of money: McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; or that nothing was paid: Shephard v. Little, 14 Johns. 210; Bowen v. Bell, 20 Johns. 338; 11 Am. Dec. 286; and, of course, that nothing was contracted to be paid. A deed may be a voluntary deed, notwithstanding it purports to be made upon a sufficient consideration. Upon what principle is it that this mere receipt, which may thus be contradicted and controlled between the parties, is even *prima facie* evidence of the payment of a consideration, against a third person, who shows a *prima facie* title by a levy on the land

case in Alabama, there was a contest between a prior and a subsequent mortgagee of the same land, the subsequent mortgagee attempting to defeat the prior mortgage on the ground that it was made to defraud creditors, and therefore was void. It was held that the recital of the debt in the first mortgage could not be taken as evidence of the existence of the debt, and that the transaction was made in good faith. "These are but the written admissions of a debtor, which may be manufactured by him in further-

which belonged to his debtor, and who is no party to the deed, has in no way admitted its validity, and has, or may have, no knowledge respecting the transaction upon which it is founded? He is not in privity with the title of the grantee. On the contrary, it is adverse to him. . . . The execution of the deed must be proved, whoever is the party contesting it. Being proved, it contains the admission of the grantor in writing that a consideration has been paid, and this furnishes evidence of that fact against him. It contains no admission of the creditors when used against them. But it is invalid against them without some evidence that it is founded upon a consideration. Is the admission of the grantor, then, evidence against the creditor to show that fact? If it be so, it must be either because the admission is under seal, or because it is contained in the deed itself. A verbal admission or declaration of the grantor that there was a consideration which had been paid would be good evidence as against him to establish that fact, but not against third persons: *Braintree v. Hingham*, 1 Pick. 245. And so of a mere receipt, or any other writing disconnected from the deed: *Jackson v. Richards*, 6 Cowen, 617, 623. We are not aware of any rule by which a seal can add to the authenticity of the receipt, or give it the character of competent evidence as against parties having no connection with it: *McCrea v. Purmort*, 16 Wend. 474. It would still be hearsay evidence, or rather *res inter alios acta*: 3 Stark. Ev. 1300; 1 Phil. Ev. (ed. 1820) 173; Cowen & Hill's ed. 229, et seq., and notes 432, 435. The actual payment of the money, or other thing mentioned in it, must still be proved. And we are of opinion that the fact that this receipt is contained in the deed does not add to its character as evidence, or confer upon it any tendency to prove itself against third persons, which it would not have if contained in a separate instrument. It proves merely that the grantor admitted that a consideration existed which had been paid, and not that one actually existed or has been discharged. It is a recital of that fact, and thus not evidence against strangers to the deed: 1 Stark. Ev., 289, § 156, and notes; *Carver v. Jackson*, 4 Pet. 83. It is said that the origin and purpose of this admission or acknowledgment in a deed is to prevent a resulting trust in the grantor, and that it is merely formal or nominal, and not designed to conclusively fix the amount either paid or to be paid: 8 Conn. 312. Being formal or nominal, it cannot be evidence against third persons that anything was paid or to be paid."

ance of a contemplated fraud.”<sup>1</sup> This view is taken in Pennsylvania, and in a controversy between a purchaser, claiming to be such for a valuable consideration, and the holder of an antecedent equity, Mr. Chief Justice Lewis, after stating that the receipt of payment is evidence of payment against the grantor, and all who *subsequently* derive title from him, but no evidence whatever of such fact against a stranger, or even against a prior purchaser, continued: “Against them it is nothing but hearsay. It is a mere *ex parte* declaration, not under oath, taken without any opportunity to cross-examine. It has been long settled that such declarations are not evidence against strangers. . . . If such evidence were received against strangers for the purpose of extinguishing their equitable rights, the salutary rules established for ages would be subverted; hearsay evidence would be substituted for testimony under the sanction of an oath, and all the advantages of a cross-examination would be swept away. Under such a system no equitable title could be protected. But it is urged that there is a presumption that the grantor and grantee have acted with integrity. This may be so, but that is no reason why their declarations should be given in evidence against persons who have no connection with them. If they are acquainted with material facts, they are as much bound to deliver their testimony under oath as other persons if competent witnesses. . . . But the rejection of a receipt signed by a stranger implies no imputation of dishonesty in the party signing it. It is always signed whenever a conveyance is made, and proves nothing further, even against the grantor, than that he has either received the purchase money or has taken security for it. Taking security for it is no payment which would defeat a prior title. *Bona fide* payment is an affirmative fact peculiarly within the knowledge of the party making such payment or claiming advantage from it. It is, therefore, easy for him to prove it. While on the other hand, the opposite party who is a stranger

<sup>1</sup> *De Vendal v. Malone's Executors*, 25 Ala. 272, 277.



to the transaction, might have insuperable difficulties in proving a negative. It is against all the reason and life of the law that such a burthen should be imposed upon him."<sup>1</sup>

§ 821. **Comments.**—The cases holding that the recital in a deed of the payment of the consideration is not evidence of that fact as against a stranger, state, as it seems to us, the true and correct principle. If the payment of the consideration price is a fact essential to the establishment of a right or claim, this fact should be proven as are other facts. The acknowledgment of payment is an admission on the part of the grantor, contained in writing it is true, but of no greater force for this reason, except for its certainty, than if made orally. Wherever his admissions will bind himself or others, the acknowledgment that he has received the consideration, should as an admission have the effect of *prima facie* evidence. But where he is powerless to make admissions to the detriment of others, it is immaterial in what form he may put such admissions. If he cannot bind others by a verbal admission, no good reason exists for allowing him to do so by putting it in writing. The question is not as to the *mode* in which the admission by the grantor of payment is made, but as to his *power* to make it; and one of the most firmly established principles of law is that one person shall not suffer by the declarations or admissions made by another out of his presence, without the opportunity to deny or cross-examine, unless there is some relation of privity, mutual interest, or agency between them.

§ 822. **Proof of real consideration.**—The recital in the deed that the consideration has been paid may be

<sup>1</sup> Lloyd v. Lynch, 28 Pa. St. 419, 424; 70 Am. Dec. 137. See to the same point, Rogers v. Hall, 4 Watts, 359; Union Canal Co. v. Young, 1 Whart. 410, 432; 30 Am. Dec. 212; Clark v. Depew, 25 Pa. St. 509; 64 Am. Dec. 717; Henry v. Raiman, 25 Pa. St. 354, 360; 64 Am. Dec. 703; Bolton v. Johns, 5 Pa. St. 145; 47 Am. Dec. 404; Nolen v. Gwynn, 16 Ala. 725; Hawley v. Bullock, 29 Tex. 216; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, 287.

contradicted by parol evidence. It may be shown by such evidence that the consideration was not paid at all, or only partially paid, or paid in a different way from that stated in the deed.<sup>1</sup> Where there are two mortgages upon a

<sup>1</sup> *Altringer v. Capehart*, 68 Mo. 441; *Bingham v. Weiderwax*, 1 N. Y. 514; *McCrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103; *Goward v. Waters*, 98 Mass. 599; *Baker v. Connell*, 1 Daly, 470; *Barnum v. Childs*, 1 Sand. 62; *Morris v. Tillson*, 81 Ill. 616; *Henderson v. Fullerton*, 54 How. Pr. 425; *Taggart v. Stanberry*, 2 McLean, 546; *Frink v. Green*, 5 Barb. 457; *Fontaine v. Boatman's Bank*, 57 Mo. 553; *Rhine v. Ellen*, 36 Cal. 362, 370; *Coles v. Soulsby*, 21 Cal. 47, 51; *Irvine v. McKeon*, 23 Cal. 472; *Bennett v. Solomon*, 6 Cal. 134, 137; *Peck v. Vandenberg*, 30 Cal. 22; *Spear v. Ward*, 20 Cal. 659, 676; *Miller v. McCoy*, 50 Mo. 214; *Averill v. Loucks*, 6 Barb. 24; *Stackpole v. Robbins*, 47 Barb. 219; *Rosboro v. Peck*, 48 Barb. 92; *Rose v. Rose*, 7 Barb. 177; *Graves v. Porter*, 11 Barb. 593; *Sanford v. Sanford*, 61 Barb. 302; 5 Lans. 493; *Fellows v. Emperor*, 13 Barb. 100; *McNulty v. Prentice*, 25 Barb. 212; *Clapp v. Terrell*, 20 Pick. 250; *Halliday v. Hart*, 30 N. Y. 494; *Arnot v. Erie Railway Co.*, 67 N. Y. 321; *Baker v. Union Mutual Life Ins. Co.*, 43 N. Y. 287; *Huebsch v. Scheel*, 81 Ill. 281; *Hannan v. Oxley*, 23 Wis. 519; *Hubbard v. Allen*, 59 Ala. 283; *Paige v. Sherman*, 6 Gray, 511; *Morris Canal Co. v. Ryerson*, 3 Dutch. 467; *Rabsuhl v. Lack*, 35 Mo. 316; *Miller v. Goodwin*, 8 Gray, 542; *O'Neale v. Lodge*, 3 Har. & McH. 433; 1 Am. Dec. 377; *Drury v. Tremont etc. Co.*, 13 Allen, 171; *Harper v. Perry*, 28 Iowa, 63; *Lawton v. Buckingham*, 15 Iowa, 22; *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 431; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 9; *Pierce v. Brew*, 43 Vt. 295; *Bullard v. Briggs*, 7 Pick. 533; 19 Am. Dec. 292; *Hull v. Adams*, 1 Hill, 603; 2 Denio, 310; *Anthony v. Harrison*, 14 Hun, 210; *Murray v. Smith*, 1 Duer, 428; *Upton v. Badeau*, 8 Brad. 15; *Walcot v. Ronalds*, 2 Rob. (N. Y.) 620; *Banks v. Brown*, 2 Hill Ch. 538; 1 Riley Ch. 131; 30 Am. Dec. 380; *Doe v. Beardsley*, 2 McLean, 414; *Goodell v. Pierce*, 2 Hill, 662; *Greenbault v. Davis*, 4 Hill, 647; *Carty v. Connolly*, 91 Cal. 15; *Cardinal v. Hadley*, 158 Mass. 352; 35 Am. St. Rep. 492; *Moffatt v. Bulson*, 96 Cal. 106; 31 Am. St. Rep. 192; *Byers v. Locke*, 93 Cal. 493; 27 Am. St. Rep. 215; *Fall v. Glover*, 34 Neb. 522; *Barbee v. Barbee*, 108 N. C. 581; *Blair v. Carpenter*, 75 Mich. 167; *Nichols v. Nichols*, 123 Pa. St. 438; *Fort v. Richey*, 128 Ill. 502. And see, also, *Jordan v. Cooper*, 3 Serg. & R. 564; *Hamilton v. McGuire*, 3 Serg. & R. 355; *Watson v. Blaine*, 12 Serg. & R. 131; 14 Am. Dec. 669; *Hutchinson v. Sinclair*, 7 Mon. 291; *Curry v. Lyles*, 2 Hill, 404; *Swisher v. Swisher's Admr.*, Wright, 755; *Harvey v. Alexander*, 1 Rand. 219; 10 Am. Dec. 519; *Higdon v. Thomas*, 1 Har. & G. 139; 17 Am. Dec. 431; *Lingan v. Henderson*, 1 Bland. 249; *Bowen v. Bell*, 20 Johns. 338; 11 Am. Dec. 286; *Depeyster v. Gould*, 2 Green Ch. 474; 29 Am. Dec. 723; *Schemmerhorn v. Vanderheyden*, 1 Johns. 139; 3 Am. Dec. 304; *Kickland v. Menasha Woodenware Co.*, 68 Wis. 34; 60 Am. Rep. 831; 31 N. W. Rep. 471; *Wood v. Morawetz*, 15 R. I. 518; 9 Atl. Rep. 427; Sul-

piece of land, and the mortgagor executes a deed to one of the mortgagees, not in payment of his debt, but as an additional security only, although the deed may recite that it is in consideration of the grantee's mortgage, and the balance due on the other mortgage, the grantee will not be compelled to pay the other mortgage debt, but may show by parol evidence what was the real consideration.<sup>1</sup> When it becomes necessary in an action upon a covenant of seisin to ascertain the damages for the breach, the true consideration, and the fact that only a part of it has been paid, may be proven by parol evidence, notwithstanding that the deed recites a different consideration, and contains an acknowledgment of its full payment.<sup>2</sup> So, in an action upon a covenant of warranty, it may be shown that the true consideration was greater than the amount named in the deed.<sup>3</sup>

**§ 823. Action for purchase price.**—"In an action for the consideration money expressed in a deed for lands sold, the clause acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer is open to explanation by parol proof. The only effect of this consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose it is open to explanation, and may be varied by parol proof."<sup>4</sup> Parol evidence is also admissible to show an additional consideration not inconsistent with the deed. Thus, the consideration of natural love and affection, though not expressed in the deed, may be shown for the purpose of sustaining the conveyance.<sup>5</sup> And a contemplated mar-

*livan v. Lear*, 23 Fla. 463; 11 Am. St. Rep. 388; 2 So. Rep. 846; *Calvert v. Nickles*, 26 S. C. 304; 2 S. E. Rep. 116; *Conlan v. Grace*, 26 Minn. 276; 30 N. W. Rep. 880.

<sup>1</sup> *Huebsch v. Scheel*, 81 Ill. 281.

<sup>2</sup> *Bingham v. Weiderwax*, 1 Comst. 509, 514.

<sup>3</sup> *Harper v. Perry*, 28 Iowa, 57, 63; *Lawton v. Buckingham*, 15 Iowa, 22.

<sup>4</sup> *Barnum v. Childs*, 1 Sand. Ch. 58, 62, per Vanderpool, J.

<sup>5</sup> *Hannan v. Oxley*, 23 Wis. 519, 522. See, also, *Preble v. Baldwin*, 6 Cush. 549; *Gale v. Coburn*, 18 Pick. 402.

riage, it seems, may be shown as an additional consideration for a deed or a contract to convey.<sup>1</sup> If a part of the consideration for a deed is that the grantee shall assume and pay a debt secured by a mortgage, it will be his duty as between him and the grantor to do so, although the deed may be made subject to the mortgage, and contain a general covenant against all encumbrances excepting the mortgage, and may express as the consideration simply the value of the equity of redemption.<sup>2</sup>

§ 824. **Quantity of land conveyed.**—If the land conveyed by a deed is described by boundaries, and as “containing four acres, more or less,” and the grantee pays the grantor for the land at a certain rate per acre for four acres, the grantor may show by parol evidence that the boundaries named in the deed would apply to a tract containing five acres, as well as to a tract containing four acres; he may also show by parol that he and the grantee employed a surveyor before the execution of the deed to ascertain the amount of the land, under an agreement that the price should be at a stipulated sum per acre, and that the grantee paid for the land upon the inadvertent statement of such surveyor, that the tract contained four acres, when, in fact, it contained five; and the grantor is entitled to recover for the additional acre at the stipulated rate.<sup>3</sup> In accordance with this principle the grantor may show that the purchase money has not been paid, and, in an action to recover the purchase money, he is not estopped by the acknowledgment on the face of the deed that the consideration has been paid.<sup>4</sup>

<sup>1</sup> *Miller v. Goodwin*, 8 Gray, 542.

<sup>2</sup> *Drury v. Tremont Imp. Co.*, 13 Allen, 171. See *Murray v. Smith*, 1 Duer, 412. Where the consideration for a deed to a railroad company is that the grantee shall erect and maintain its depot on the land, and the depot is erected and maintained for a number of years and then removed, the land does not revert to the grantor, but he may maintain an action for partial failure of consideration: *Berkley v. Union Pac. Ry. Co.*, 33 Fed. Rep. 794.

<sup>3</sup> *Paige v. Sherman*, 6 Gray, 511.

<sup>4</sup> *Taggart v. Stanberry*, 2 McLean, 543.

§ 825. **Parol promise of grantee to convey other land.** Where the grantor, as a consideration for his deed, relies upon the parol promise of the grantee to convey certain other land to him, and the grantee refuses to perform his agreement, the grantor may recover the value of the property from the grantee upon an implied *assumpsit*. If, in such a case, the grantor show that the grantee agreed to give another tract of land worth a certain price for the land so conveyed, this is practically an admission on the part of the grantee that the value of the land conveyed by the grantor was such sum.<sup>1</sup> And it may be observed, that if the grantee has put it out of his power to comply with his promise by conveying to another person the land he had promised to convey to his grantor, the grantor is not required to demand a deed from the grantee before commencing an action to recover the value of the land.<sup>2</sup> It may be shown by parol evidence that the grantor, for the sum stated as the consideration in the deed, agreed to convey to the grantee two lots of land, each for a price agreed upon, that the grantee paid to the grantor the price agreed to be paid for both lots, and that through the grantor's fraud or mistake, the deed conveyed only one of the lots. If the grantor when requested to convey the other lot refuses to do so, the grantee may recover the consideration which he has paid for it, with interest.<sup>3</sup>

§ 826. **Verbal promise.**—It may also be shown by parol, in contradiction of the acknowledgment of the receipt of the consideration, that the grantee, as a part of the consideration, made a verbal promise that he would pay the grantor whatever he might receive over a specified amount upon the resale of the land, and an action of

<sup>1</sup> Bassett v. Bassett, 55 Me. 127.

<sup>2</sup> Bassett v. Bassett, 55 Me. 127. Where as parts of one transaction a grantor executes a deed and the grantee executes an agreement to re-convey, the execution of one instrument is a sufficient consideration to support the other: Wilson v. Fairchild, 45 Minn. 203.

<sup>3</sup> Goodspeed v. Fuller, 46 Me. 141; 71 Am. Dec. 572. But see in this connection the earlier cases in Maine of Steele v. Adams, 1 Greenl. 1, and Emery v. Chase, 5 Greenl. 232.

*assumpsit* will lie to recover the excess.<sup>1</sup> So, it may be shown by parol evidence for the purpose of creating a resulting trust that the consideration price was not paid by the grantee, but by a third person.<sup>2</sup> Such evidence does not tend to contradict the deed. The recital of payment may state that the consideration was paid by the grantee, but it does not state that it was his money. This is a fact outside of the conveyance.

§ 827. **Vesting of title.**—If a tract of land, a part of a Mexican grant, is conveyed in consideration of an agreement on the part of the grantee to prosecute the claim before the courts until it is finally confirmed, the title vests absolutely in the grantee. In case he fails to perform his agreement, the remedy of the grantor lies in an action for damages for breach of the agreement.<sup>3</sup>

§ 828. **Retention of purchase money by grantee.**—The grantor may show, notwithstanding the acknowledgment of payment of the consideration in the deed, that the grantee retained a part of the money to be applied to the grantor's use.<sup>4</sup> So it may likewise be shown that the part of the money retained by the grantee was to be paid by him to a third person for the grantor's benefit.<sup>5</sup> So it is permissible to show by parol evidence that the grantee

<sup>1</sup> Hall v. Hall, 8 N. H. 129.

<sup>2</sup> Pritchard v. Brown, 4 N. H. 397; 17 Am. Dec. 431; Scoby v. Blanchard, 3 N. H. 170; Dudley v. Botsworth, 10 Humph. 9; 51 Am. Dec. 690. It may be shown by parol evidence that a deed made by a judgment debtor after a sale on execution was made to enable the grantee to redeem the land from the sale, and that he agreed to hold the property, make necessary advances, and upon a resale, after deducting what he had advanced to pay the remainder to the judgment debtor: Byers v. Locke, 93 Cal. 493; 27 Am. St. Rep. 212. See, also, Michael v. Foil, 100 N. C. 178; 6 Am. St. Rep. 577; Ryman v. Mosher, 71 Ind. 596; McCarthy v. Pope, 52 Cal. 561; Price v. Sturgis, 44 Cal. 591; Miller v. Kendig, 55 Iowa, 174; Hodges v. Green, 28 Vt. 358; Hess v. Fox, 10 Wend. 437; Trowbridge v. Wetherbee, 11 Allen, 361; Collins v. Tillou, 26 Conn. 368; 68 Am. Dec. 398; Kintner v. Jones, 122 Ind. 148.

<sup>3</sup> Hartman v. Reed, 50 Cal. 485.

<sup>4</sup> Schillinger v. McCann, 6 Greenl. 314,

<sup>5</sup> Burbank v. Gould, 15 Me. 118.

has retained a part of the consideration money, under an agreement to pay the note of the grantor to a third person, and in an action for money had and received to his use, such third person may recover the amount of the note and interest.<sup>1</sup>

**§ 829. Whether a gift or an advancement.**—When a deed made by a father to his son, expressed a consideration of two thousand dollars, parol evidence was admitted to show that no money was really paid, but that the deed was made as an advancement to the son.<sup>2</sup> The question whether in such a case the conveyance should be considered as a gift, or as an advancement, or partly each, will depend, of course, upon the intent of the grantor. And it is held that where land is conveyed by a father to his son, worth at least two thousand dollars, and it is shown that the intention of the grantor in making the deed was to make an advancement, equal to the advancement made to each of his other sons, amounting to one thousand dollars, the grantee should be charged with an advancement of only such sum of one thousand dollars.<sup>3</sup> Where a deed of bargain and sale recites a pecuniary consideration, it may be shown that there was also the consideration of an advancement to the daughter of the bargainer.<sup>4</sup> So where a deed recites that a consideration of so much money has been paid, it may be shown by parol that the real consideration was a specified quantity of iron, at a price agreed upon.<sup>5</sup>

**§ 830. Reason for this rule admitting parol evidence as to consideration.**—There is a well-defined distinction

<sup>1</sup> *Dearborn v. Parks*, 5 Greenl. 81; 17 Am. Dec. 206.

<sup>2</sup> *Meeker v. Meeker*, 16 Conn. 383.

<sup>3</sup> *Meeker v. Meeker*, 16 Conn. 383.

<sup>4</sup> *Hayden v. Mentzer*, 10 Serg. & R. 329.

<sup>5</sup> *McOrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103. This is regarded as a leading case on this point, and the cases sustaining and in conflict with this view are cited and commented upon. And see *Nickerson v. Saunders*, 36 Me. 413; *Emmons v. Littlefield*, 13 Me. 233; *Bowen v. Bell*, 20 Johns. 338; 11 Am. Dec. 286; *Morse v. Shattuck*, 4 N. H. 229; 17 Am. Dec. 419; *Belden v. Seymour*, 8 Conn. 304; 21 Am. Dec. 661.



between a release and a mere receipt. A release extinguishes an obligation. It may be considered as a conveyance, inasmuch as it may be said to transfer to the releasee a right due to the releasor. It, therefore, as an instrument in writing cannot be contradicted by parol evidence. But a receipt is a mere admission of payment, entitled to some weight as an admission, but subject to explanation or contradiction. It is at the present time unnecessary to insert an acknowledgment of the receipt of the consideration in the deed at all, as a writing imports a consideration;<sup>1</sup> and even if it did not, the grantor could not defeat his own voluntary deed. The reasons on which the rule allowing parol evidence to be received to show the true consideration of a deed are very fully explained in a case in Kentucky. As an able exposition of the law on this subject we quote the language of Mr. Justice Robertson, who says: "The authorities on this subject in England, as well as in the States of this Union, are various and contradictory. But we believe that the consistent doctrine, and that which accords best with analogy, and with the practice and understanding of mankind, is that an acknowledgment in a deed of the receipt of the consideration is only *prima facie* evidence of payment. The acknowledgment is inserted more for the purpose of showing the actual amount of consideration than its payment; and it is generally inserted in deeds of conveyance, whether the consideration has been paid, or only agreed to be paid. If the consideration has not been paid, such an acknowledgment in a deed would be intended to mean that the specified amount had been assumed by note or otherwise. An ordinary receipt is not conclusive evidence of the facts attested by it. A separate receipt for the price of land would, it seems to us, be much stronger evidence that the money had been paid, than the customary acknowledgment in the deed of conveyance. At all events, it should be as cogent. But it may be contradicted; why may not the other? An

<sup>1</sup> See *Merle v. Mathews*, 26 Cal. 455.

attention to the principles upon which parol testimony is admissible to explain or avoid the effect or the apparent import of a writing, may reconcile many, if not all, of the authorities which seem to be in conflict. One of these principles is, that in certain classes of cases, the statute of frauds and perjuries requires writing to vest rights; it would be subversive of the policy of the statute to allow parol testimony to change the legal import of the written evidence of a right adopted to certify it, therefor, in all such cases, no inferior grade of testimony shall be admitted to supply or control the intrinsic meaning of the writing. Another principle, and one more universal than the former in its application, is that wherever a right is vested, or created, or extinguished by contract, or otherwise, and writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal and common-sense construction of the instrument. But that any writing, which neither by contract, the operation of law, nor otherwise, vests or passes or extinguishes any right, but is only used as evidence of a *fact*, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus, a will, a deed, or a covenant in writing, so far as they transfer, or are intended to be evidence of rights, cannot be contradicted or opposed, in their legal construction, by facts *aliunde*. But receipts and other writings which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation, and liable to contradiction by witnesses. A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything which it may contain. For instance, it is not the only evidence of the date of its execution; nor is its omission of a consideration conclusive evidence that none passed; nor is its acknowledgment of a particular

consideration an objection to other proof of other and consistent considerations. And by analogy, the acknowledgment in a deed, that the consideration had been received, is not conclusive of the fact. *This is but a fact.* And testing it by the rationality of the rule which we have laid down, it may be explained or contradicted. It does not *necessarily* and undeniably prove the fact. It creates no right. It extinguishes none. A release cannot be contradicted or explained by parol, because it extinguishes a pre-existing debt. But no receipt can have the effect of destroying, *per se*, any subsisting right. It is only *evidence* of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt, it is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguisher itself. The acknowledgment of the payment of the consideration in a deed is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment in the deed is generally merely formal. But if it be inserted for the purpose of attesting the fact of payment (as it seldom, if ever, is in this country), it is not better evidence than a sealed receipt on a separate paper would be; and, as we have already said, it seems to us that it would not be as good, for obvious reasons. The practice of inserting such acknowledgments in deeds is very common, whether the consideration had been paid or not. 'For and in consideration of \$ —, in hand paid,' etc., is a commonplace phrase, which may be found in deeds generally. And it is seldom intended as evidence of payment, or for any other practical purpose, except to show the amount of consideration. To establish the conclusiveness of such loose expressions, therefore, might produce extensive injustice. If a note had been given for the consideration, and afterward without payment a deed be executed for the land, with the commonplace phraseology in relation to the

price, would this be conclusive evidence that the notes had been paid off and discharged? Surely not.”<sup>1</sup>

§ 831. **Parol agreement to execute devise.**—An owner of land conveyed it to another, the deed expressing a consideration in money, and acknowledging the receipt of the consideration. The true consideration, however, was the parol agreement of a third party to devise to the grantor a certain farm, and such third person executed his will at the same time, making in it such a devise. The grantor having entered upon the land and cut timber, the court held in an action of trespass *quare clausum fregit* against the grantor, that the deed was made upon good consideration, and that it was unnecessary to examine into the cases in which parol evidence is admitted or rejected for the purpose of contradicting the consideration. “The principle,” said the court, “which seems to govern this case, is that where a vendor, without fraud or mistake, accepts of the engagement of a third person for the consideration agreed on, and on the faith of such engagement acknowledges the receipt of the consideration, it is against equity that he should be permitted to defeat the operation of the grant by showing that the consideration was not paid. As between vendor and vendee the consideration is to be treated as fully paid, and the vendor is estopped from denying it.”<sup>2</sup>

§ 832. **Community property.**—In some of the States the rules of the common law relative to property held by husband and wife have been changed, and a distinction is made between separate property and community property. Separate property is such as is acquired before marriage, or acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof. All other property acquired after marriage by either husband or wife, or both, is declared to be community property. But it is presumed that all property acquired

<sup>1</sup> Gully v. Grubbs, 1 Marsh. J. J. 387, 389.

<sup>2</sup> McMullin v. Glass, 27 Pa. St. 151.

after marriage is community property, and the party claiming it to be separate property has the burden of establishing this fact.<sup>1</sup> But as a party has the right to rebut this presumption, the deed, so far as it recites the payment of a consideration by a particular person, or from particular friends, may be contradicted;<sup>2</sup> and this may be done by parol evidence.<sup>3</sup> It may be shown by such evidence, where it is recited in a deed from a mother to her married daughter, that it was made in consideration of love and natural affection, as well as for a sum of money, that no money consideration existed, and that the deed was one of gift, having thus the effect of making the land so conveyed the separate property of the daughter instead of the common property of herself and husband.<sup>4</sup> But where the wife is dead and the record shows that the title is vested in the husband alone, a pur-

<sup>1</sup> *Moore v. Jones*, 63 Cal. 12; *Kohner v. Ashenauer*, 17 Cal. 581; *Adams v. Knowlton*, 22 Cal. 288; *Peck v. Vandenberg*, 30 Cal. 11; *Alverson v. Jones*, 10 Cal. 9; 70 Am. Dec. 689; *Tryon v. Sutton*, 13 Cal. 493; *Ramsdell v. Fuller*, 28 Cal. 42; 87 Am. Dec. 103; *McDonald v. Badger*, 23 Cal. 399; 83 Am. Dec. 123; *Mott v. Smith*, 16 Cal. 557; *Bernal v. Gleim*, 33 Cal. 668; *Smith v. Smith*, 12 Cal. 224; 73 Am. Dec. 533; *Meyer v. Kinzer*, 12 Cal. 252; 73 Am. Dec. 538; *Tustin v. Faught*, 23 Cal. 241; *Althof v. Conheim*, 38 Cal. 233; 99 Am. Dec. 363; *Burton v. Lies*, 21 Cal. 91; *Pixley v. Huggins*, 15 Cal. 131; *Riley v. Pehl*, 23 Cal. 70; *Landers v. Bolton*, 26 Cal. 420; *Schuler v. Savings etc. Soc.*, 1 West Coast Rep. 125; *Browder v. Clemens*, 61 Tex. 587; *Rice v. Rice*, 21 Tex. 66; *Pearce v. Jackson*, 61 Tex. 644; *Zorn v. Traver*, 45 Tex. 520; *Lott v. Keach*, 5 Tex. 394; *Brackett v. Devine*, 25 Tex. 194; *Cox v. Miller*, 54 Tex. 25; *Wood v. Wheeler*, 7 Tex. 20; *Cooke v. Bremond*, 27 Tex. 459; 86 Am. Dec. 626; *Schmeltz v. Garey*, 49 Tex. 49; *Huston v. Curl*, 8 Tex. 239; 58 Am. Dec. 110; *Mitchell v. Marr*, 26 Tex. 329; *De Blane v. Lynch*, 23 Tex. 25; *Love v. Robertson*, 7 Tex. 6; 56 Am. Dec. 41; *Chapman v. Allen*, 15 Tex. 278.

<sup>2</sup> *Moore v. Jones*, 63 Cal. 12.

<sup>3</sup> *Peck v. Brummagin*, 31 Cal. 440; 89 Am. Dec. 195, and cases cited above.

<sup>4</sup> *Peck v. Vandenberg*, 30 Cal. 11. Commencing on page 22 will be found a valuable and exhaustive review by Judge Sawyer of the cases bearing upon this subject. The learned justice reviews first the common-law authorities on the question of the extent to which the consideration expressed in a deed may be explained or contradicted, and then adverts to the cases in which evidence has been admitted to show that a conveyance made after marriage was separate property. See *Higgins v. Johnson*, 20 Tex. 393; 70 Am. Dec. 394; *Gonor v. Gonor*, 11 Rob. (La.) 526;

chaser for value of the land is not chargeable with notice that the land was in fact community property, where there is nothing to affect him with notice.<sup>1</sup>

**§ 833. In North Carolina acknowledgment is release.** In North Carolina, the rule seems to be that the acknowledgment in a deed that the consideration has been paid is, in an action to recover the purchase money, a release, and is a bar to the action. And in one of the cases in which this is held, the court remark that the effect of adhering to this rule, "will only be to make men cautious in executing deeds; but if it be understood that a solemn acknowledgment under seal is insufficient to prove the payment of money, it is to be apprehended that many perjuries will arise."<sup>2</sup>

**§ 834. Showing absence of consideration to defeat deed.**—As has been shown, the courts allow the greatest latitude of inquiry as to what consideration really passed between the parties, and the grantor is not estopped by his acknowledgment of payment in any action which he may bring for the recovery of the purchase money or other object, so long as the validity of the deed as an operative conveyance is not attacked. But the rule which we have been considering is subject to the important qualification that parol evidence cannot be admitted for the purpose of destroying the effect and operation of the deed.<sup>3</sup> From this rule, it follows that the grantor cannot

*Claiborne v. Tanner*, 18 Tex. 70; *Huston v. Curl*, 8 Tex. 240; 58 Am. Dec. 110; *Rose v. Houston*, 11 Tex. 326; 62 Am. Dec. 478; *McIntyre v. Chappell*, 4 Tex. 187; *Love v. Robertson*, 7 Tex. 8; 56 Am. Dec. 41.

<sup>1</sup> *Woodward v. Suggett*, 59 Tex. 619. And see *Morris v. Meek*, 57 Tex. 385.

<sup>2</sup> *Brockett v. Foscue*, 1 Hawks (L. & Eq.), 64, 67; *Lowe v. Weatherley*, 4 Dev. & B. 212; *Mendenhall v. Parish*, 8 Jones (N. O.), 106; 78 Am. Dec. 269; *Graves v. Carter*, 2 Hawks (L. & Eq.), 576; 11 Am. Dec. 786; *Spiers v. Clay's Administrator*, 4 Hawks (L. & Eq.), 22.

<sup>3</sup> *Grout v. Townsend*, 2 Hill, 554, 557; *Coles v. Soulsby*, 21 Cal. 47; *Wilkinson v. Scott*, 17 Mass. 257; *McOrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103; *Kinnebrew v. Kinnebrew*, 35 Ala. 636; *Beach v. Cooke*, 28 N. Y. 537; 86 Am. Dec. 266; *Stackpole v. Robbins*, 47 Barb. 219; Ar-

claim that a trust results to himself when he has executed a deed without consideration. This would be defeating the deed by parol evidence, which cannot be done.<sup>1</sup> Creditors, of course, can show that a deed was made without consideration for the purpose of defeating it.<sup>2</sup>

*thur v. Arthur*, 10 Barb. 24; *Bullard v. Briggs*, 7 Pick. 537; 19 Am. Dec. 292; *Goodspeed v. Fuller*, 46 Me. 141; 71 Am. Dec. 572; *Rockwell v. Brown*, 54 N. Y. 213; *Peck v. Vandenberg*, 30 Cal. 23. See, also, *Commercial Bank etc. v. Norton*, 1 Hill, 509; *Doe v. Beardley*, 2 McLean, 412, 414; *Philbrook v. Delano*, 29 Me. 410; *Goodwin v. Gilbert*, 9 Mass. 510; *Wilt v. Franklin*, 1 Binn. 502; 2 Am. Dec. 474; *Barnum v. Childs*, 1 Sand. 58, 62; *Winans v. Peebles*, 31 Barb. 371; *Farrington v. Barr*, 36 N. H. 86; *Graves v. Graves*, 29 N. H. 129; 3 Wash. Real Prop. (4th ed.), 377.

<sup>1</sup> *Burn v. Winthrop*, 1 Johns. Oh. 329; *Burt v. Wilson*, 28 Cal. 632; *Graves v. Graves*, 29 N. H. 129; *Ownes v. Ownes*, 23 N. J. Eq. 60; *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266; *Graff v. Rohrer*, 35 Md. 327; *Hutchins v. Lee*, 1 Atk. 447; *Lloyd v. Spillett*, 2 Atk. 250; *Young v. Peachy*, 2 Atk. 257. And see *Morris v. Morris*, 2 Bibb, 311; *Randall v. Phillips*, 3 Mason, 388; *McKenney v. Burns*, 31 Ga. 295.

<sup>2</sup> *Peck v. Vandenberg*, 30 Cal. 22; *Johnson v. Taylor*, 4 Dev. 355. And see *Hubbard v. Allen*, 59 Ala. 296; *Fellows v. Smith*, 40 Mich. 689. See where the recital of a consideration in a deed from a corporation showed that the act was not authorized by the charter: *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416; 34 Am. St. Rep. 815. See, also, §§ 710, *ante*, and 1000, *post*.



## CHAPTER XXV.

### PRINCIPLES OF CONSTRUCTION.

#### PART I.

##### GENERAL PRINCIPLES.

- § 835. Prefatory section.
- § 836. Intention of parties.
- § 836 a. Unusual form of deed.
- § 837. Technical terms.
- § 838. Expression of grantor's motive.
- § 838 a. Expressions limiting title conveyed.
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- § 838 c. Further consideration—Execution sales.
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- § 842. Illustrations.
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- § 849. Divers estates.
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- § 850. Construction favorable to operation of deed.
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- § 852. Election of grantee.
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## PART II.

### COMMUNITY PROPERTY.

- § 865. In what States exists.
- § 866. The civil law.
- § 867. In other countries.
- § 868. Presumption of community property.
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- § 870. In California and Louisiana.
- § 871. Land purchased by earnings of wife.
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- § 874. Title acquired after voluntary separation.
- § 875. Gift in compensation for services.
- § 876. Rebuttal of presumption of community property.
- § 877. Presumption when deed is made to wife.
- § 878. The rule in Texas.
- § 879. Purchase on credit.
- § 880. Tortious possession and deed in consideration of surrender thereof.

§ 835. Prefatory section.—It is not intended in this chapter to enter into a detailed examination of the number of cases decided on the import of particular language found in the deed. There are, however, a few well-established rules of construction which are resorted to by courts in the construction of deeds. But it is doubtful how far arbitrary rules can be of service where the only object is to determine the intention of the parties. In fact, the truth was well expressed by Mr. Justice Sanderson, who said that “in the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value—one which is

frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it.”<sup>1</sup> This is the main object of all construction. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention. In this chapter are given some of the general rules of construction, while in other chapters will be found sections relating to the construction of language used in those clauses which form the different parts of a deed.

§ 836. **Intention of parties.**—As in the case of all contracts, the intent of the parties to the deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law.<sup>2</sup> A deed conveyed a certain gore or strip of flats described in the deed, and continued: “The said strip or gore to begin at the lower end of Milk Wharf, so called, and to run four hundred and eighty feet to the channel. And the said grantors, for the consideration aforesaid, hereby release to the said grantee, or to any other person or persons that may build any wharf on the western line of said strip of flats and in the continuation of the said new wharf and on the line thereof to the eastward, all our right, title, and interest to the said gore of flats to the channel, or so far as our right extends, for the use and benefit of the proprietors of the wharf which may be built as aforesaid. To have and to

<sup>1</sup> In *Walsh v. Hill*, 38 Cal. 481, 487.

<sup>2</sup> *Brannan v. Mesick*, 10 Cal. 95; *Thomas v. Hatch*, 3 Sum. 170; *Bent v. Rogers*, 137 Mass. 192; *Bryan v. Bradley*, 16 Conn. 474; *Litchfield v. Cudworth*, 15 Pick. 23; *Racouillat v. Sansevain*, 32 Cal. 376; *Frost v. Spaulding*, 19 Pick. 445; 31 Am. Dec. 150; *Deering v. Long Wharf*, 25 Me. 51; *Wallis v. Wallis*, 4 Mass. 135; 3 Am. Dec. 210; *Marshall v. Fisk*, 6 Mass. 24; 4 Am. Dec. 76; *Barnes v. Haybarger*, 8 Jones (N. O.), 76; *Jennings v. Brizeadine*, 44 Mo. 332; *Jackson v. Blodgett*, 16 Johns. 172; *Mills v. Cattin*, 22 Vt. 98; *Waterman v. Andrews*, 14 R. I. 589; *Cumberland Building and Loan Assn. v. Aramingo Episcopal Church*, 13 Phila. 171; *Pike v. Monroe*, 36 Me. 309; 58 Am. Dec. 751; *Jackson v. Myers*, 3 Johns. 888; 3 Am. Dec. 504; *Callis v. Lavelle*, 44 Vt. 290; *Smith v. Brown*, 66 Tex. 543.

hold the said granted and bargained premises, with the privileges and appurtenances thereof, to the said grantee, his heirs and assigns, to his and their use and behoof forever." The deed also contained the usual covenants of warranty, and it was held that by the first description the grantee took an absolute estate in fee of the property described, and that by the second description, all the right, title, and interest of the grantors to the property described passed to the grantee, and not "to the use and benefit of the wharf which might be built."<sup>1</sup> If a question of law arises upon the construction of a deed, it is the province of the court to construe it and to decide from the language what the intention of the parties was.<sup>2</sup> When the intention of the parties can be plainly ascertained, arbitrary rules are not to be resorted to.<sup>3</sup> The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable, when not contrary to law.<sup>4</sup> A party executed to four others an instrument, which, beginning in the ordinary form of a bargain and sale

<sup>1</sup> *Deering v. Long Wharf*, 25 Me. 51.

<sup>2</sup> *Mulford v. Le Franc*, 26 Cal. 88. See, also, *Bell v. Woodward*, 46 N. H. 337; *Thornberry v. Churchill*, 4 Mon. 29; 16 Am. Dec. 125; *Hurley v. Morgan*, 1 Dev. & B. 425; 28 Am. Dec. 579.

<sup>3</sup> *Kimball v. Semple*, 25 Cal. 449; *Prentice v. Duluth Storage and Forwarding Co.*, 58 Fed. Rep. 437; *Free and Accepted Masons v. School Town of Newpoint*, 138 Ind. 141; *United States v. Cameron*, 21 Pac. Rep. 177 (Ariz., Apr. 6, 1889).

<sup>4</sup> *Pike v. Monroe*, 36 Me. 309; 58 Am. Dec. 751; *Means v. Presbyterian Church*, 3 Watts & S. 303; *Moore v. Griffin*, 22 Me. 350; *Mills v. Catlin*, 22 Vt. 98; *Benedict v. Gaylord*, 11 Conn. 332; 29 Am. Dec. 299; *Chouteau v. Suydam*, 21 N. Y. 170; *Wolfe v. Scarborough*, 2 Ohio St. 361. See *Churchill v. Reamer*, 8 Bush, 256; *Olute v. New York Cent. etc. R. R. Co.*, 120 N. Y. 267; *Bartholomew v. Muzzy*, 61 Conn. 387; 29 Am. St. Rep. 206. The effort should be so to construe the deed as seems most likely to effectuate the intention of the parties: *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; *Post v. Weil*, 115 N. Y. 361; 12 Am. St. Rep. 809; *Berridge v. Glassey*, 112 Pa. St. 442; 56 Am. Rep. 324; *Eisely v. Spooner*, 23 Neb. 470; 8 Am. St. Rep. 128; *Bradley v. Zehmer*, 82 Va. 685; *Lowdermilk v. Bostick*, 98 N. C. 299. But a deed can convey nothing except what it describes, whatever may have been the intention of the parties: *Thayer v. Finton*, 108 N. Y. 394.

deed, purported to convey to them, for a certain consideration, the property described, with a general warranty of title. Then followed a power of attorney giving authority to the grantees to take possession of the property, and to sell and convey, or lease the same in the name of the grantor, and to receive the purchase money and rents. The grantor also agreed not to sell, lease, or authorize any other person to sell or lease the property, or revoke the power of attorney, unless default was made in the payment of the consideration in the installments mentioned in the deed. The deed contained a covenant that if the amount was paid at the time agreed upon, the instrument should take effect as a full conveyance in fee of the land, and also a covenant, in case of the grantor's failure to fulfill his covenants, the instrument should take effect as a conveyance. The instrument was held to be a conveyance upon a condition precedent, until the performance of which no title passed to the grantees. On performance of the condition the title would vest in the grantees without any further act on the grantor's part, but until that time the title remained in the grantor.<sup>1</sup> In a deed the grantor conveyed "all his right, title, interest, and estate in and to all the estate, real, personal, or mixed, which J. C. and J. C., junior, died, seised or possessed of." It was held that the word "and" did not mean the joint estate alone, but that the deed conveyed the interest of the grantor in all the estate, whether joint or several.<sup>2</sup> "It was the manifest intent of the parties, that the grantor's right in all the estate, whether joint or several, should pass. And such must be the operation of the deed. It is not uncommon to construe *and* to mean *or*, and *or* to mean *and*, when necessary to carry into effect the intention of the parties."<sup>3</sup> A deed conveyed to the grantee, "and her heirs and assigns for-

<sup>1</sup> Brannan v. Mesick, 10 Cal. 95.

<sup>2</sup> Litchfield v. Cudworth, 15 Pick. 23.

<sup>3</sup> Litchfield v. Cudworth, *supra*. Subsequent acts of the parties may be considered in construing an ambiguous deed: Wilson v. Carrico, 140 Ind. 533; 49 Am. St. Rep. 213.

ever, a certain piece or parcel of land situated, lying, and being in Halifax, and is the same farm on which [the grantor] now lives; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, . . . always provided that in the event of her decease, the same shall revert to me, if living, if not, to my heirs, being the same farm which I purchased of Darius Plumb." The *habendum* was to the grantee, "and her heirs and assigns, to her and their own proper use, benefit, and behoof forever." The deed contained the usual covenants of warranty, seisin, and against encumbrances, and also this clause following the covenants: "Always reserving the reversion to myself and heirs, as stipulated in the deed." The court held that the manifest intent was to convey an estate for life and not an estate in fee, and the deed must take effect according to such intent.<sup>1</sup>

<sup>1</sup> Flagg v. Eames, 40 Vt. 16; 94 Am. Dec. 363. And see, also, Collins v. Lavelle, 44 Vt. 230; Colby v. Colby, 28 Vt. 10. No peculiar form of words is necessary to make a deed operative. Any words showing an intention to convey will be sufficient: Baker v. Westcott, 73 Tex. 129; Jennings v. Brezadine, 44 Mo. 335; American Emigrant Co. v. Clark, 62 Iowa, 182. An instrument in the following form will convey the title to real estate: "Know all men by these presents, that I, John Martin, of the city of Philadelphia, mariner, in consideration of the sum of one thousand dollars, to me paid by Elizabeth Martin, gentlewoman, the receipt whereof is hereby acknowledged, as also for divers other good and valuable considerations, have granted, bargained, sold, conveyed, and assigned, and by these presents do grant, bargain, sell, convey, and assign all debts, dues, or demands wheresoever and whatsoever, real, personal, or mixed, which are due and owing, or of right, belonging unto me, either by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise, or which hereafter may become due. The said Elizabeth Martin to have and to hold the same unto her, the said Elizabeth, her heirs and assigns forever": McWilliams v. Martin, 12 S. & R. 269; 14 Am. Dec. 688. And see Harper v. Blean, 3 Watts, 475; 27 Am. Dec. 367; Dice v. Sheffer, 3 W. & S. 419; Stone's Appeal, 2 Pa. St. 432. Where the grantee duly signed and acknowledged an indorsement on a deed in these words: "I assign the within for value received," it is held that the title to the land described in the deed will pass to the assignee: Harlowe v. Hudgins, 84 Tex. 107; 31 Am. St. Rep. 21. See, also, Lemon v. Graham, 131 Pa. St. 447. But it is held in Lessee of Bentley's Heirs v. De Forest, 2 Ohio, 221, 15 Am. Dec. 546, that an indorsement on a deed assigning it does not convey an interest in the land described, and at best

§ 836 a. **Unusual form of deed.**—Although the form of a deed may be unusual, the intention of the grantor, when it appears, must be given effect, and the deed will not be declared void unless the various clauses are so repugnant as to leave no other course to be followed.<sup>1</sup> If a husband executes a deed to his wife containing a stipulation that when she shall cease to live with him as his wife the title shall revert to him, the title will not revert on the wife's commission of adultery.<sup>2</sup> If the only reason urged for construing a particular clause in a deed is founded upon the technical words which have been used, the court may disregard them in determining the effect to be given to the conveyance, and such a construction should be adopted as on a general view of the instrument, and of the intention which the parties had in view, seems most likely to carry their intention into effect.<sup>3</sup>

§ 837. **Technical terms.**—"The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect."<sup>4</sup> And if a deed cannot take effect in the precise way intended, yet if it can operate in another mode it will be so construed.<sup>5</sup> If there

can be considered only an executory contract. See, also, *Doe ex dem. Linker v. Long*, 64 N. C. 296; *Arms v. Burt*, 1 Vt. 303; 18 Am. Dec. 680; *Tunstall v. Long*, 109 N. C. 316. But the deed must contain words of some kind indicating an intent to convey: *Webb v. Mullins*, 78 Ala. 111; *Hummelman v. Mounts*, 87 Ind. 178; *Brown v. Manter*, 21 N. H. 528; 53 Am. Dec. 223; *Sharp v. Bailey*, 14 Iowa, 387; 81 Am. Dec. 489; *Davis v. Davis*, 43 Ind. 561.

<sup>1</sup> *Cravens v. White*, 73 Tex. 577; 15 Am. St. Rep. 808.

<sup>2</sup> *Rayor v. Rayor*, 142 Ill. 375; 31 N. E. Rep. 678.

<sup>3</sup> *Post v. Weil*, 115 N. Y. 361; 12 Am. St. Rep. 809.

<sup>4</sup> Chief Justice Kent, in *Jackson v. Myers*, 3 Johns. 388, 395; 3 Am. Dec. 504; *Prentice v. Duluth Storage and Forwarding Co.*, 58 Fed. Rep. 437.

<sup>5</sup> *Parker v. Nichols*, 7 Pick. 111; *Goodtitle v. Bailey*, Cowp. 600; *Barrett v. French*, 1 Conn. 354; 6 Am. Dec. 241; *Lynch v. Livingston*, 8



is a conflict in a deed between what is written and what is printed, the written part prevails.<sup>1</sup> Where in a printed blank form of a warranty deed, the printed words "forever, a certain piece and parcel of land lying and being" are stricken out, and the words "all my right, title, and interest in and unto" are inserted in their place, followed by a description of the land, the deed containing a covenant, "that until the ensealing of these presents, we are the sole owners of the premises, and that they are free,"

Barb. 463; 2 Seld. 422; *Jackson v. Blodgett*, 16 Johns. 172; *Doe v. Sal-keld*, Willes, 673; *Wallis v. Wallis*, 4 Mass. 135; 3 Am. Dec. 210; *Haggerston v. Hanbury*, 5 Barn. & C. 101; *Smith v. Frederick*, 1 Russ. 174; *Bryan v. Bradley*, 16 Conn. 474; *Russell v. Coffin*, 8 Pick. 143; *Brewer v. Hardy*, 22 Pick. 376; 33 Am. Dec. 747; *Roe v. Tanmar*, Willes, 682; *Walker v. Hall*, 2 Lev. 213; *Thompson v. Attfield*, 1 Vern. 40; *Thorne v. Thorne*, 1 Vern. 141; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Doe d. Lewis v. Davies*, 2 Mees. & W. 503; *Doe d. Starling v. Prince*, 20 L. J. N. S. C. P. 223; *Doe d. Daniell v. Woodroffe*, 10 Mees. & W. 608; *Coltman v. Senhouse*, 2 Lev. 225; *Crossing v. Scudamore*, 2 Lev. 9; 1 Mod. 175; *Harrison v. Austin*, Carth, 38; *Doe d. Were v. Cole*, 7 Barn. & C. 243; *Adams v. Steer*, Cro. Jac. 210; *Rigden v. Vallier*, 2 Ves. Sr. 253; *Haggerson v. Hanbury*, 5 Barn. & C. 101; *Nash v. Ash*, 1 Hurl. & C. 160. See, also, *Winborne v. Downing*, 100 N. C. 20; *Lemon v. Graham*, 131 Pa. St. 447; *Starnes v. Hill*, 112 N. C. 1; *Moore v. City of Waco*, 85 Tex. 206; *Carson v. Fuhs*, 131 Pa. St. 256; *Staffordville Gravel Co. v. Newell*, 53 N. J. L. 412; 19 Atl. Rep. 209; *Greer v. Pate*, 85 Ga. 552; *Behmyer v. Odell*, 31 Ill. App. 350; *Huber v. Crosland*, 140 Pa. St. 575; 21 Atl. Rep. 404; *Campbell v. Morgan*, 68 Hun, 490; *Field v. City of Providence*, 17 R. I. 803; *Smith v. Smith*, 71 Mich. 633; 40 N. W. Rep. 21; *Ratliffe v. Marrs*, 87 Ky. 26; 8 S. W. Rep. 876; *White's Trustee v. White*, 86 Ky. 602; 7 S. W. Rep. 26; *Wonn v. Pittman*, 82 Ga. 637; *Brown v. Ferrell*, 83 Ky. 417; *Grieber v. Lindenmeier*, 42 Minn. 99; *Anderson v. Logan*, 105 N. C. 266.

<sup>1</sup> *Cummings v. Dearborn*, 56 Vt. 441. This is the rule with regard to all contracts: *McNear v. McComber*, 18 Iowa, 17; *Hill v. Miller*, 76 N. Y. 32; *Carrigan v. Insurance Co.*, 53 Vt. 418; 38 Am. Rep. 687; *Clark v. Woodruff*, 83 N. Y. 518; *Weisser v. Maitland*, 3 Sand. 318; *Robertson v. French*, 4 East, 130. But both the written and printed parts will be construed together and operation given to both if possible: *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Alsagar v. St. Catherine's Dock Co.*, 14 Mees. & W. 794; *Goix v. Low*, 1 Johns. Cas. 341; *Hunter v. General Mut. Ins. Co. of N. Y.*, 11 La. Ann. 139; *Wallace v. Insurance Co.*, 4 La. 289; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487; *Howland v. Comm. Ins. Co.*, Anth. 46; *Goicoechla v. Louisiana State Ins. Co.*, 6 Mart., N. S. (La.), 51; 17 Am. Dec. 175.

etc., the deed is a quitclaim deed.<sup>1</sup> If the deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses of the deed will not defeat such intention.<sup>2</sup> As said by Lord Wensleydale: "The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed; a most important distinction in all classes of construction, and the disregard of which often leads to erroneous conclusions."<sup>3</sup> The express language of a deed, however, cannot be subverted by a mere matter of convenience or taste.<sup>4</sup> Where a technical word is used, evidently in a sense different from its technical signification, the court will give to it the construction which the grantor intended.<sup>5</sup> A grantor has the right to assign to words in the deed a meaning different from that which they ordinarily bear.<sup>6</sup> But the construction of a deed is the province of the court.<sup>7</sup> All conveyances affecting real

<sup>1</sup> *Cummings v. Dearborn*, 56 Vt. 441. The word "premises" may refer to the interest intended to be conveyed as well as to the land.

<sup>2</sup> *Bent v. Rogers*, 137 Mass. 192. In *Coleman v. Beach*, 97 N. Y. 545, 553, Mr. Chief Justice Ruger, in delivering the opinion of the court, said: "If the disposition which the owner of property desires to make does not contravene any positive prohibition of law, his control over it is unlimited, and the only office which the courts are called upon to perform, in construing his transfers of title, is to discover and give effect to his intentions. In the case of repugnant dispositions of the same property contained in the same instrument, the courts are of necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made. If it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon, and interpretations of the literal signification of the language used, must be imposed, as will give some effect if possible to all of the provisions of the deed."

<sup>3</sup> In *Monypenny v. Monypenny*, 9 Hoffm. L. Cas. 146. See, also, *Ex parte Chick*, *Re Meredith*, 11 Chip. D. 739; *Evans v. Vaughan*, 4 Barn. & C. 286; *Hilbers v. Parkinson*, 25 Chip. D. 203; *Smith v. Packhurst*, 3 Atk. 126.

<sup>4</sup> *Fratt v. Woodworth*, 32 Cal. 219; 91 Am. Dec. 573.

<sup>5</sup> *Central Pacific R. R. Co. v. Beal*, 47 Cal. 151.

<sup>6</sup> *Morrison v. Wilson*, 30 Cal. 344. See *Wilcoxson v. Sprague*, 51 Cal. 640.

<sup>7</sup> *Moody v. Palmer*, 50 Cal. 32. See *Whitman v. Steiger*, 46 Cal. 256.

estate, so far as questions of their validity, force, effect, and construction are concerned, must depend entirely on the law of the place where the property is situated.<sup>1</sup> Words which are not technical must be construed as bearing their ordinary signification.<sup>2</sup> “Rules of construction are adopted with a view to ascertain the intention of the parties, and are founded in experience and reason, and not arbitrarily adopted. They are not intended to make terms for contracting parties, but simply to ascertain what the language means which they have employed in their contracts. There are words in deeds, as in notes and other instruments which have a technical meaning, and are construed accordingly; but language in deeds or notes, or other instruments, not technical, must be taken in its ordinary and usual sense. There is no reason why a rule which will discover the meaning of language not technical, in a note or other instrument, may not be re-

A deed is not a mere quitclaim deed which contains the words, “have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim, . . . all our right, title, and interest, estate, claim, and demand, both at law and in equity, and as well in possession as in expectancy”: *Wilson v. Irish*, 62 Iowa, 260. Where a person who holds a second mortgage, and is also co-assignee in bankruptcy of the estate of the mortgagor, executes a quitclaim deed of the property to a third person, the latter becomes an assignee of the second mortgage, but does not take the interest of the grantor as co-assignee in bankruptcy; the assignees in bankruptcy still retain the equity of redemption: *Southwick v. Atlantic Fire & Mar. Ins. Co.*, 133 Mass. 457. Where the deed shows an intent to transfer any future interest which the grantor might acquire, the deed will be treated in equity as an executory agreement to convey, and the grantor will be compelled to convey the interest subsequently acquired: *Hannon v. Christopher*, 34 N. J. Eq. 459. Where a person conveys to a town and “their successors and assigns for literary purposes,” with the agreement that the town should keep the property in repair “for the specific purpose of maintaining a public school,” this is not a dedication of the property to public uses: *McGehee v. Woodville*, 59 Miss. 648.

<sup>1</sup> *West v. Fitz*, 109 Ill. 425. As to the law of place in the construction of covenants, see *Bethell v. Bethell*, 54 Ind. 428; 23 Am. Rep. 650. See, also, as to law of place, *Doe d. Moore v. Nelson*, 3 McLean, 383; *Clark v. Graham*, 6 Wheat. 577. See as to statutory provisions: *Butterfield v. Beall*, 3 Ind. 203; *Root v. Brotherson*, 4 McLean, 230.

<sup>2</sup> *Bradshaw v. Bradbury*, 64 Mo. 334.

sorted to, to ascertain the meaning of language not technical in a deed.”<sup>1</sup>

§ 838. **Expression of grantor's motive.**—The effect of the deed must depend upon the effect of the language used. A grantor can impose conditions, and can make the title conveyed dependent upon their performance. But if he does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive.<sup>2</sup> Thus, where a deed states in the *habendum* clause that it is made “for the sole and separate use and benefit of the wife and her children forever,” these words will not give any estate to the children; they perform no other office than to indicate the grantor's motive. The court said that, if it had not been the intention of the parties to convey an absolute fee to the grantee, “the land would doubtless have been conveyed to a trustee, to manage it, and to apply the profits to the support of the wife and children, and provision made for turning over their interests to the children as they should respectively attain full age. The consideration flowed from her alone, and her husband, being insolvent, the burden of maintaining the family was cast upon her. The language of the *habendum* of the deed already quoted merely indicates the motive for the conveyance to her, which was to provide a home and the means of support for herself and children, free from the control of her husband, and secure from the claims of his creditors.”<sup>3</sup>

§ 838 a. **Expressions limiting title conveyed.**—If a grantor conveys all his right, title, and interest, and adds “being a one-half undivided interest,” the operation of the deed to convey all the grantor's interest, is not limited by these words, nor will they be construed as excepting

<sup>1</sup> Bradshaw v. Bradbury, 64 Mo. 334, 336, per Henry, J.

<sup>2</sup> Mauzy v. Mauzy, 79 Va. 537.

<sup>3</sup> Mauzy v. Mauzy, 79 Va. 537, 539, and cases cited.

any interest conveyed by the prior words of grant.<sup>1</sup> Subsequent provisions will not be deemed to have the effect of restricting what has been previously granted.<sup>2</sup> The effect of a deed conveying land cannot be destroyed by a clause stating that it is intended to convey the title which the grantor received from a specified deed, when, by the latter, no title whatever was conveyed.<sup>3</sup> The question is not always one of intent, but of enforcing established and well-defined principles of law. When it was sought to show, by the language of the deed and by evidence offered for that purpose, that the grantor received no title by the conveyance specified in his deed, and hence his deed passed no title, Mr. Justice Emery said: "In support of this contention the defendant invokes the broad proposition that, in considering written instruments, courts should always seek for the actual intent of the parties, and give effect to that intent when found, whatever the form of the instrument. The proposition has been stated perhaps as broadly as this in text-books and judicial opinions, but it is not universally true. It is hedged about by some positive rules of law, which the parties must heed if they would effectuate their intent, or avoid consequences they did not intend. Muniments of title, especially, are guarded by positive rules of law, to secure their certainty, precision, and permanency. If, in the effort to ascertain the real intent of the parties, one of these rules is encountered, it must control, for no positive rule of law can be lawfully violated in the search for intent. Some of these rules prevent an intent from becoming effectual, however clearly expressed, because the language required by the rule was not used. . . . There is one rule pertaining to the construction of deeds, as ancient, general, and rigorous as any other. It is the rule that a grantor cannot destroy his own grant, how-

<sup>1</sup> *McLennan v. McDonnell*, 78 Cal. 273.

<sup>2</sup> *Thornton v. Mehring*, 117 Ill. 55; *Pike v. Monroe*, 36 Me. 309; 58 Am. Dec. 751.

<sup>3</sup> *Maker v. Lazell*, 83 Me. 562; 23 Am. St. Rep. 795.

ever much he may modify it or load it with conditions—the rule that having once granted an estate in his deed, no subsequent clause, even in the same deed, can operate to nullify it. We do not find that this rule has ever been disregarded, or even seriously questioned, by courts. We find it often stated, approved, and sometimes made a rule of decision.”<sup>1</sup> Thus, where an owner of land “releases, quitclaims, and conveys [to the grantee], and its successors and assigns forever, all his claim, right, title, and interest of every name and nature, legal or equitable in, and to” the land, and by a subsequent clause declares that “the interest and title intended to be conveyed by this deed is only that acquired” by the grantor by virtue of a specified deed which had been previously executed to him, and which it is assumed conveys to him only an undivided half interest in the land, the two clauses are inconsistent. The words contained in the granting clause must prevail, and the whole interest of the grantor will pass by the deed.<sup>2</sup>

**§ 838 b. Subsequent clauses neither enlarging nor limiting grant.**—Where a description concludes with a statement “meaning and intending to convey the same premises conveyed to me,” this will not enlarge the grant, but is merely an aid to trace the title.<sup>3</sup> If the description in a deed is clear and complete, a statement that it is the same land described in a recorded agreement will not, by reference to such agreement, be construed as showing that a smaller quantity of land was conveyed than would appear from the face of the deed.<sup>4</sup> In case a fee is conveyed, it is not rendered a qualified fee, because the deed contains a declaration of the use, but it is to be construed

<sup>1</sup> *Maker v. Lazell*, 83 Me. 562; 23 Am. St. Rep. 795.

<sup>2</sup> *Green Bay and Mississippi Canal Co. v. Hewett*, 55 Wis. 96; 42 Am. Rep. 701.

<sup>3</sup> *Brown v. Heard*, 85 Me. 294.

<sup>4</sup> *Jones v. Webster Woolen Co.*, 85 Me. 210. That the tendency is to uphold the deed, see § 855, *post*.

as directory to the administration of the trust.<sup>1</sup> When land is conveyed to the bishop of the Roman Catholic Church, for the benefit of the church, and to his assigns and successors forever, a fee simple, in the absence of any conditions subsequent, either express or implied, is vested in such bishop in trust for the church.<sup>2</sup> If the granting clause in a deed is sufficient to convey all of the interest of the grantor, and the deed also contains a clause stating that it is expressly agreed that the interest conveyed by the deed by the grantor "is that only which he acquired by a conveyance" from another person, and the grantor has not acquired any interest from the latter, but owns an interest acquired from a different source, the interest of the grantor is conveyed by the deed.<sup>3</sup>

§ 838 c. Further consideration—Execution sales.—So, in the case of a deed made pursuant to a sale on execution, where the deed conveys all the right, title, and interest of the judgment debtor in and to certain property specifically described, and contains the phrase, "being a leasehold unexpired, originally granted" in a manner described, the fee will pass to the purchaser when the execution debtor is, in fact, at the time of the sale, the owner of the property. The recital as to the leasehold interest will not have the effect of limiting the estate

<sup>1</sup> Board of Commissioners of Mahoning County v. Young, 59 Fed. Rep. 98; 8 C. O. A. 27.

<sup>2</sup> Gabert v. Olcott, 86 Tex. 121. See, also, Pritchard v. Bailey, 113 N. C. 521; Marsh v. Morris, 133 Ind. 548; Branson v. Studebaker, 133 Ind. 147; Bodwell Granite Co. v. Lane, 83 Me. 168; 21 Atl. Rep. 829. A statement in a deed that it is made for a special and particular purpose will not create, by implication, a condition subsequent, as where a deed to a city states in the *habendum* that the land conveyed is to be held forever as and for a street, to be kept as a public highway." If the city fails to use the land conveyed as a street, it does not revert to the grantor: Kilpatrick v. Mayor of Baltimore, 81 Md. 179; 48 Am. St. Rep. 509. See, where the purpose expressed is for a street, Soukup v. Topka, 54 Minn. 66; 50 N. W. Rep. 824; Greene v. O'Connor, 18 R. I. 56; 25 Atl. Rep. 692. As to park, see Flaten v. City of Moorehead, 51 Minn. 518; 53 N. W. Rep. 807.

<sup>3</sup> Wilcoxson v. Sprague, 51 Cal. 640.



conveyed by the preceding general terms of description.<sup>1</sup> Likewise, if the language in the deed shows that an undivided moiety is conveyed, and it is subsequently claimed, that by virtue of an added clause in the deed the grantor really intended to convey an undivided one-quarter interest only, the court, if such be the meaning of the clause, will reject it for repugnance.<sup>2</sup> If a grantor conveys land by a definite description, and then adds, "intending hereby to convey the same lands, and no other, which passed to me by virtue of" a mortgage which he designates, and if the description covers other land than that included in the mortgage, the title to the additional land will be conveyed by the deed.<sup>3</sup> The whole object is to construe the deed so as to give effect to it, if possible, as a conveyance, and clauses which are repugnant to the general intention of the deed must be declared void.<sup>4</sup> Hence, a grant made in the premises of a deed cannot be contradicted or retracted in a subsequent part of the deed.<sup>5</sup>

**§ 839. Surrounding circumstances.** — The circumstances connected with the transaction and the situation of the parties may be considered in arriving at the intent of the parties.<sup>6</sup> On a portion of public land occupied by two parties, a dam and mill had been erected. One of

<sup>1</sup> *Dodge v. Walley*, 22 Cal. 226.

<sup>2</sup> *Cutler v. Tufts*, 3 Pick. 272.

<sup>3</sup> *Wilder v. Davenport*, 58 Vt. 642.

<sup>4</sup> *Wilcoxson v. Sprague*, 51 Cal. 640.

<sup>5</sup> *Winter v. Gorsuch*, 51 Md. 180; *Budd v. Brooke*, 3 Gill. 198; 43 Am. Dec. 321.

<sup>6</sup> *Truett v. Adams*, 66 Cal. 218; *Treat v. Strickland*, 23 Me. 234; *Pico v. Coleman*, 47 Cal. 65; *Morris Canal etc. Co. v. Matthiesen*, 17 N. J. Eq. (2 Green) 385; *Mulford v. Le Franc*, 26 Cal. 88; *Abbott v. Abbott*, 53 Me. 356; *Hadden v. Shoutz*, 15 Ill. 581; *Dunn v. English*, 23 N. J. L. (3 Zab.) 126; *Adams v. Frothingham*, 3 Mass. 352; 3 Am. Dec. 151; *Bradford v. Cressey*, 45 Me. 9; *Hamm v. San Francisco*, 17 Fed. Rep. 119; *Winnipiseogee etc. Co. v. Perley*, 46 N. H. 83; *French v. Carhart*, 1 N. Y. (1 Oomst.) 96; *Saunders v. Clark*, 29 Cal. 299; *Wade v. Deray*, 50 Cal. 376; *Kinney v. Hooker*, 65 Vt. 333; 36 Am. St. Rep. 864. See *Piper v. True*, 36 Cal. 606; *Sprague v. Edwards*, 48 Cal. 239; *Kingsland v. New York*, 45 Hun, 198.

these conveyed to the other six acres of the land, describing the part conveyed by metes and bounds, with the hereditaments and appurtenances thereunto belonging. It was agreed between the parties that the purchaser from the government of this land should convey his recognized portion of it to the other. By reason of the structure of the dam, the water had flowed over the land of both parties, and the court held that the right to flow the land was an appurtenance, and was so understood at the time of the execution of the deed.<sup>1</sup> Where land adjoins tide-waters and is conveyed "with the flats adjoining the land and appertaining thereto, meaning to convey only the flats of right belonging to said parcel of land," the grantee will take only such flats as the court may determine to belong to the parcel of land conveyed, unless it is shown by sufficient evidence that the language was used by the parties in a different sense. If such is the case, the language must receive that construction which will carry out the intention of the parties.<sup>2</sup> Whether an instrument is or is not a deed, is a question of law to be decided by the court, and it cannot be shown to be a deed by evidence *dehors* the instrument.<sup>3</sup>

§ 840. **This is but one rule.**<sup>4</sup>—The rule mentioned in the preceding section is but one of the numerous rules of construction, the object of all of which is to ascertain the intent of the parties. Generally, in the construction of every doubtful or ambiguous deed, the intent cannot be obtained by the application of one rule alone. All should be considered, and to each should be given its proper weight. As illustrating the manner to be adopted in arriving at the intent of the parties, the language of Mr. Chief Justice Shaw, of Massachusetts, is peculiarly pertinent: "The same individual, owning two tenements

<sup>1</sup> Hadden v. Shoutz, 15 Ill. 581.

<sup>2</sup> Treat v. Strickland, 23 Me. 234.

<sup>3</sup> Corlies v. Van Note, 16 N. J. L. (1 Har.) 324.

<sup>4</sup> This section is cited as authority in Hickey v. Lake Shore etc. Ry. Co., 51 Ohio St. 40; 46 Am. St. Rep. 545.

adjoining, may carve out and sell any portion that he pleases, and the terms of the grant, as they can be learned, either by words clearly expressed, or by just and sound construction, will regulate and measure the rights of the grantee. In construing the words of such a grant, where the words are doubtful or ambiguous, several rules are applicable, all, however, designed to aid in ascertaining what was the intent of the parties, such intent, when ascertained, being the governing principle of construction. And first, as the language of the deed is the language of the grantor, the rule is, that all doubtful words shall be construed most strongly against the grantor, and most favorably and beneficially for the grantee. Again, every provision, clause, and word in the same instrument shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, of covenant, or description, or words of qualification, restraint, exception, or explanation. Again, every word shall be presumed to have been used for some purpose, and shall be deemed to have some force and effect, if it can have. And further, although parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, watercourses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description.”<sup>1</sup> Where the meaning is doubtful, evidence as to the acts of the parties may be admitted to show the intent.<sup>2</sup> But where the terms of the deed are plain and intelligible, and the instrument can operate, evidence as to the acts of the parties claim-

<sup>1</sup> In *Salesbury v. Andrews*, 19 Pick. 250, 252.

<sup>2</sup> *Winnipiseogee etc. Co. v. Perley*, 46 N. H. 83.

ing under it is not admissible.<sup>1</sup> The intent, when clearly expressed, cannot be altered by evidence of extraneous circumstances.<sup>2</sup>

§ 841. **Appearance at time of sale.**—If, by an artificial arrangement, an owner of land has created an advantage for one part of the land to the detriment of the other, the holders of the two parts upon a severance of the ownership, take them as they openly and visibly appeared at time of the deed. As said by Selden, J: "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time, rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right by altering arrangements then openly existing, to change materially the relative value of the respective parts."<sup>3</sup> A person leased a tract

<sup>1</sup> *Dunn v. Bank of Mobile*, 2 Ala. 152; *Hutchings v. Dixon*, 11 Md. 29.

<sup>2</sup> *Means v. Presbyterian Church*, 3 Watts & S. 303.

<sup>3</sup> *Lampman v. Mills*, 21 N. Y. 505, 507.

of land to A, reserving the streams of water and the soil under them, with the privilege of erecting upon any part of the premises mills and dams, and reserving also the land which might be overflowed in consequence of such dams. A sold a part of the premises to B with like exceptions, and the latter erected a dam on his land, by which the land of A was overflowed. The court held that until the original owner exercised his right and erected dams, the reservation was inoperative, and if considered strictly as an exception, was void for uncertainty.<sup>1</sup> Where a tract of land is conveyed, described by metes and bounds, with a mill upon it, and there was at the time of the conveyance a raceway to conduct the water from the mill running along the side of a stream beyond the limits of the land conveyed into other land owned by the grantor, and finally discharging into the stream, and this raceway had been used for many years in connection with the mill, and was required for the convenient use of the mill, the right to the uninterrupted flow of the water through the whole extent of the raceway passed by the conveyance, as appurtenant to the mill.<sup>2</sup> If a deed grants a right of way over other lands

<sup>1</sup> Thompson v. Gregory, 4 Johns. 81; 4 Am. Dec. 255.

<sup>2</sup> New Ipswich Factory v. Batchelder, 3 N. H. 190; 14 Am. Dec. 346. The court quoted this language from Nicholas v. Chamberlain, Cro. James, 121: "It was held by all the court, upon demurrer, that if one erect a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and the pipes pass with the house; *because they are necessary and quasi appendant thereto*. And he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and after the term determines, the lessor occupies them together for a time, and afterward sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and pipes, and liberty to amend them." The court then declares that the rule thus laid down "seems to us to be founded on sound reason and good sense, and to apply in all its force to the case now before us. A raceway may be as necessary an appurtenance to a mill to conduct the water from it, as a canal to conduct to it the water necessary to work it. In many cases a severance of

of the grantor, and subsequently, by parol agreement, the parties locate the precise position of the way, the right of way which will pass to a subpurchaser is limited and defined by such agreement.<sup>1</sup>

§ 842. *Illustrations.*—Another illustration of the principle that where the owner of two tenements sells one of them, the grantee takes the premises with the benefits and burdens which appear at the time of the conveyance to belong to it, is a case where the owner of a spring lot and of a paper mill on another tract had conveyed the water to the mill by an artificial arrangement. He sold the spring lot, and the court held that the grantee took it subject to the burden.<sup>2</sup> If a boundary line is described as running up the river to certain falls, “thence continuing to run in such a direction as to include a millyard and the whole of a millpond, which may be raised by a dam on said falls to a certain road,” the description determines the boundary of the land itself, and not the height to which it is permissible to raise the pond.<sup>3</sup> It was said by Judge Story: “It has been very correctly stated at the bar, that in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties. In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for.”<sup>4</sup> But

the appurtenance from the thing to which it is appurtenant, would render both useless. For aught we know, that may be the case in this instance. But however that may be, the case finds that the raceway was necessary for the convenient working of the mills. Shepherd in his *Touchstone*, 89, says: ‘By the grant of mills the waters, floodgates, and the like, that are of necessary use to the mills, do pass,’ and we entertain no doubt that the raceway in this case passed by Barrett’s deed, as an appurtenance to the mill.”

<sup>1</sup> *Kinney v. Hooker*, 65 Vt. 333; 36 Am. St. Rep. 864.

<sup>2</sup> *Seymour v. Lewis*, 13 N. J. Eq. 439; 78 Am. Dec. 108.

<sup>3</sup> *Hull v. Fuller*, 4 Vt. 199.

<sup>4</sup> In *United States v. Appleton*, 1 Sum. 492, 501.

actual knowledge on the part of the contracting parties will repel the presumption of law, that in the case of the sale of land the parties contract with reference to the physical condition of the property at the time.<sup>1</sup> The result of the decisions on this question is thus summed up by Mr. Justice Folger: "1st. That when an owner of a whole tenement has by some artificial arrangement of the material properties of his estate, added to the advantages and enhanced the value of one portion of it, he cannot after selling that portion with those advantages openly and visibly attached, voluntarily break up the arrangement, and thus destroy or materially diminish the value of the portion sold. 2d. It is further held, that the moment the severance of the tenement takes place by a sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements and servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. 3d. It is further held, that parties are presumed to contract in reference to the condition of the property at the time of the sale, and that neither has a right by altering arrangements then openly existing, to change materially the relative value of the respective parts."<sup>2</sup>

**§ 843. Grammatical construction.**—"A grammatical construction is not always to be followed, and it has been well said that neither false English nor bad Latin will make void a deed when the meaning of the party is apparent. In construing an instrument, that construction is always to be adopted which will accomplish the object for which the instrument was executed."<sup>3</sup> A father executed a deed to his son, reserving a maintenance to him-

<sup>1</sup> *Simmons v. Cloonan*, 47 N. Y. 3.

<sup>2</sup> In *Simmons v. Cloonan*, 47 N. Y. 3, 9. And see, also, *Curtis v. Ayrault*, 47 N. Y. 73; *Cox v. Matthews*, 1 Vent. 237; *Hazard v. Robinson*, 3 Mason, 272; *Brakely v. Sharp*, 2 Stockt. Ch. 206; *Robbins v. Barnes*, Hob. 131; *Palmer v. Fletcher*, 1 Lev. 122; 2 Sid. 167; *Shury v. Piggot*, 3 Bulst. 339; *Kilgour v. Ashcom*, 5 Har. & J. 82; *Dunkles v. Milton R. R. Co.*, 4 Fost. (N. H.) 489.

<sup>3</sup> *Hancock v. Watson*, 18 Cal. 137, per Cope, J.



self, and requiring the payment of his debts. The deed contained a condition giving the grantor a right of re-entry in case the grantee neglected to pay such debts, *and* suffered the grantor to be put to cost, trouble, or expense on account of such debts. The court held, that after the grantor's death, the neglect to pay a debt which he owed, although not presented after his death, worked a forfeiture of the estate, and that the grammatical sense of words is not to be adhered to in the construction of either a deed or a will where a contrary intent is manifest; and that the word "and" may be read "or," when by so doing effect will be given to the intent of the parties.<sup>1</sup> "It is not the practice of courts of justice to divest persons of their estates by a rigid adherence to the rules of grammatical construction, or by a strict interpretation of the language of an instrument, when the sense in which the words were used is apparent from other portions of the instrument viewed in the light of the attending facts. The sole object to be obtained in the construction of contracts is to ascertain the real intention of the parties; and with this view the whole contract and all its provisions, together with the relations of the parties toward each other, will be considered; and effect will be given to the intent thus ascertained, however clumsily the instrument may be worded, and however grossly it may violate the strict rules of grammatical construction."<sup>2</sup>

§ 844. **Resort to punctuation.** — While little regard is to be paid to punctuation, yet it may be looked to as a last resort. "Punctuation," says Mr. Justice Baldwin, "is a most fallible standard by which to interpret a

<sup>1</sup> Jackson v. Topping, 1 Wend. 388; 19 Am. Dec. 515.

<sup>2</sup> Sprague v. Edwards, 48 Cal. 239, 249, per Mr. Justice Crockett, in delivering the opinion of the court. See, also, Racouillat v. Sansevain, 32 Oal. 376, 387. Relative words in the construction of all contracts are generally deemed to refer to the nearest antecedent: Bold v. Molineux, Dyer, 14 b: Com. Dig. tit. Parols (A. 14); Rex v. Inhabitants of St. Mary's, 1 Barn. & Ald. 327; Baring v. Christie, 5 East, 398; 2 Parsons on Contracts (6th ed.), 513. But see Gray v. Clark, 11 Vt. 583; Stamiland v. Hopkins, 9 Mees. & W. 178; Carbonel v. Davies, 1 Strange, 394.

writing. It may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it.”<sup>1</sup>

**§ 845. Construing deeds together.**—When two or more deeds are executed at the same time between the same parties, in relation to the same subject matter, they may, in some instances, for the purpose of construing their intent and effect, be taken together and treated as one instrument.<sup>2</sup> But to enable two or more instruments to be read together it is not sufficient that they were made between the same parties and at the same time. The rule cannot apply unless the instruments themselves show, or the fact is made to appear by extrinsic evidence, that they relate to the same transaction. Hence, where a party's title to two adjoining parcels of land is derived by a separate deed for each parcel, from the same grantor, and bearing the same date, but which do not refer to each other, and in one of the deeds a piece of land which is parcel of the premises conveyed by the other deed is in terms excepted, each deed must stand by itself; and as the exception is not for a part of the thing granted by the deed in which it was contained, it is void.<sup>3</sup> When the

<sup>1</sup> *Ewing v. Burnet*, 11 Pet. 41. See, also, *Doe v. Martin*, 4 Term Rep. 65; 3 Dane Abr. 558.

<sup>2</sup> *Clap v. Draper*, 4 Mass. 266; 3 Am. Dec. 215; *Cornell v. Todd*, 2 Denio, 130; *King v. King*, 7 Mass. 496; *Patterson v. Donner*, 48 Cal. 369; *Cloyes v. Sweetser*, 3 Cush. 403; *Jackson v. McKenny*, 3 Wend. 233; 20 Am. Dec. 690; *Jackson v. Dunsbagh*, 1 Johns. Cas. 91; *Gerdes v. Moody*, 41 Cal. 335; *Pulliam v. Bennett*, 55 Cal. 368. See *Putnam v. Stewart*, 97 N. Y. 411; *Moore v. Fletcher*, 16 Me. 63; 33 Am. Dec. 633; *Leach v. Leach*, 4 Ind. 628; 58 Am. Dec. 642; *Wildman v. Taylor*, 4 Ben. 42; *Isham v. Morgan*, 9 Conn. 374; 23 Am. Dec. 361.

<sup>3</sup> *Cornell v. Todd*, 2 Denio, 130. Said the court, per Bronson, C. J.: “It is not necessary that the instruments should in terms refer to each other, if, in point of fact they are parts of a single transaction. But until it appears that they are such, either from the writings themselves, or by extrinsic evidence, the case is not brought within the rule. Now, here there is no reference in either of the two deeds to the other; nor is there any extrinsic evidence, if such would have been admissible, that

same grantor makes separate deeds to different grantees, they will not be construed together in determining the rights of the grantees with respect to the common subject matter.<sup>1</sup> Where a grantor executed a deed conveying the absolute fee, and, at the same time, the grantee executed an instrument which recited that he received the property charged with the settlement of the just debts of the grantor, this instrument is admissible in evidence in an action of ejectment brought by the grantee to show, on the part of the defendant, that the grantee had put a trust in the property, and that therefore the widow of the grantor, who had intermarried with the defendant since the execution of the deed, was entitled to dower in the land.<sup>2</sup> Where several deeds of release are executed as parts of one and the same transaction in effecting a partition of real estate between heirs, tenants in common, they must, in their construction, be read together, and by their com-

they were both parts of one act. They are between the same parties, and have the same date; but it is not inferable from those facts alone that they are parts of a single transaction. It may very well be that the same parties should have several transactions in one day, and of the same general nature, and yet that each one should be distinct from and wholly independent of the other. But there is something more than the want of a connecting link between these two deeds. They do not relate to the same subject matter. It is true that they are both conveyances of land; but the parcels are separate and distinct, and each deed stands upon its own independent consideration. This is a decisive feature in the case. Where two deeds neither refer to each other, nor relate to the same subject matter, I am not aware of any principle upon which one can be made to qualify, or in any way affect the legal construction of the other. No extrinsic evidence could help out the defendant's case; for whatever might be proved, it would still remain true that the deeds themselves neither refer the one to the other, nor do they relate to the same subject matter; and parol evidence cannot be allowed to control the legal effect or operation of a deed." For a case in which an absolute deed and a deed in trust for the benefit of the grantor's unsecured creditors were construed together, see *Kruse v. Prindle*, 8 Or. 158.

<sup>1</sup> *Rexford v. Marquis*, 7 Lans. 249.

<sup>2</sup> *Doe v. Bernard*, 15 Miss. (7 Smedes & M.) 319. And see *Bell v. Mayor of New York*, 10 Paige, 49; *Pepper v. Haight*, 20 Barb. 429; *Ford v. Belmont*, 7 Rob. (N. Y.) 97; *Everett v. Thomas*, 1 Ired. 252; *Field v. Huston*, 21 Me. 69.

bined effect the rights of the parties under them must be settled.<sup>1</sup> Reciting a previous agreement in a deed is equivalent to confirming and renewing it.<sup>2</sup>

§ 846. **Rule in Shelley's case.**—The rule in Shelley's case has been much discussed in works treating of the law of real property. The rule is thus stated: "When the ancestor by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase."<sup>3</sup> In Kent's Commentaries, the definition given by Mr. Preston as abridged, is said to be full and accurate: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."<sup>4</sup> And Kent himself says:

<sup>1</sup> *White v. Brokaw*, 14 Ohio St. 339.

<sup>2</sup> *Salbourn v. Houstoun*, 1 Bing. 433; *Barfoot v. Freswell*, 3 Keb. 465; *Sampson v. Easterby*, 9 Barn. & C. 505. But covenants contained in a prior agreement will not run with the land because the deed recites that it is executed "per agreement": *Close v. Burlington, Cedar Rapids etc. Ry. Co.*, 64 Iowa, 149. And see *Hunt v. Amidon*, 4 Hill, 345; 40 Am. Dec. 283. Where land was sold on condition that the vendee and a third party should execute a bond not to erect certain buildings on the land, and the bond was signed before the execution of the deed, but both were delivered on the same day, the court held that the two instruments should be construed as parts of one and the same transaction, notwithstanding that the deed did not refer to the bond, and the bond recited that the vendee had purchased the land: *Robbins v. Webb*, 68 Ala. 393. A prior unrecorded deed is not defeated by a subsequent deed of the grantor's "now remaining interest" in land, because both deeds may stand together, as the second deed is not a conveyance of anything previously conveyed: *Eaton v. Trowbridge*, 38 Mich. 455.

<sup>3</sup> 1 Coke, 104.

<sup>4</sup> Kent's Com. 215; 1 Preston on Estates, 263-419. But where this rule still prevails, courts are inclined to confine its operation within strict limits: *McIlhinny v. McIlhinny*, 137 Ind. 411; 45 Am. St. Rep. 186.

"The word 'heirs,' or 'heirs of the body,' creates a remainder in fee or in tail, which the law to prevent an abeyance vests in the ancestor, who is tenant for life, and by the conjunction of the two estates he becomes tenant in fee or in tail; and whether the ancestor takes the freehold by express limitation, or by resulting use, or by implication of law; in either case the subsequent remainder to his heirs unites with and is executed on his estate for life. Thus where A was seised in fee, and covenanted to stand seised to the use of his heirs male, it was held that as the use during his life was undisposed of, it of course remained in him for life by implication, and the subsequent limitation to his heirs attached in him."<sup>1</sup> This rule has in a number of instances as to both deeds and wills, been recognized and enforced in this country as a part of the common law.<sup>2</sup> But in many States the rule is now abolished by statute, and of the abolition of the rule, it is said by Kent that "in its practical operation it will, in cases where the rule would otherwise have applied, change estates in fee into contingent remainders. It sacrifices the paramount intention in all cases, and makes the heirs instead of the ancestor the *stirps* or *terminus* from which the posterity of heirs is to be deduced. It will tie up property from alienation during the lifetime of the first taker, and the minority of his heirs. But this, it may perhaps be presumed, was the actual intention of the party in every case, in which he creates an express estate for life in the first taker, for otherwise he would not have so limited it. It is just to allow individuals the liberty

<sup>1</sup> 4 Kent's Com. 215.

<sup>2</sup> Ridgeway v. Lamphear, 99 Ind. 251; Payne v. Sayle, 2 Dev. & B. Eq. 455; Ware v. Richardson, 3 Md. 505; 56 Am. Dec. 762; Roy v. Garnett, 2 Wash. (Va.) 9; Polk v. Faris, 9 Yerg. 209; 30 Am. Dec. 400; Simper's Lessee v. Simper, 15 Md. 160; Carr v. Porter, 1 McCord Ch. 50; Dott v. Cunningham, 1 Bay, 453; 1 Am. Dec. 624; Cooper v. Cooper, 6 R. I. 261; Davidson v. Davidson, 1 Hawks, 163; Horne v. Lyeth, 4 Har. & J. 531; Kiser v. Kiser, 2 Jones Eq. 28; Hodges v. Little, 7 Jones (N. C.), 145; Lyles v. Digges, 6 Har. & J. 364; 15 Am. Dec. 281; Bishop v. Selleck, 1 Day, 299; Brant v. Gelston, 2 Johns. Cas. 384. See Green v. Green, 23 Wall. 486.

to make strict settlements of their property in their own discretion, provided there be nothing in such dispositions of it affecting the rights of others, nor inconsistent with public policy or the settled principles of law. But this liberty of modifying at pleasure the transmission of property is in many respects controlled, as in the instance of a devise to charity, or to aliens, or as to the creation of estates tail; and the rule in Shelley's case only operated as a check of the same kind and to a very moderate degree. Under the existence of the rule, land might be bound up from circulation for a life, and twenty-one years afterward, only the settler was required to use a little more explicitness of intention and a more specific provision. The abolition of the rule facilitates such settlements, though it does not enlarge the individual capacity to make them; and it is a question for experience to decide whether this attainable advantage will overbalance the inconvenience of increasing fetters upon alienation, and shaking confidence in law, by such an entire and complete renunciation of a settled rule of property, memorable for its antiquity, and for the patient cultivation and discipline which it has received."<sup>1</sup>

<sup>1</sup> 4 Kent's Com. 232. And in a note he adds: "The juridical scholar on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's case, which were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful criticism, and refined distinctions which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in *Perrin v. Blake*, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat

§ 847. **Lawful issue.**—In connection with the rule in Shelley's case, we call the reader's attention to a peculiarly worded deed where the grant was to a person "and to his lawful issue, to go to his surviving brother or brothers and

and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeves. What I have, therefore, written on this subject, may be considered, so far as my native State is concerned, as a humble monument to the memory of departed learning": 4 Kent's Com. 232. In Missouri, since the abolition of this rule, a deed to a person for life, with remainder over in fee simple to the heirs, creates simply a life estate in such person: *Tesson v. Newman*, 62 Mo. 198. As to the States in which this rule has been abolished, see Alabama Code, 1867, § 1574; New York, Rev. Stats. (4th ed.) pt. 2, tit. 2, art. 1, § 28; Virginia Code, 1873, c. 112, § 11; Wisconsin, Rev. Stats. 1878, § 2052; California, Civil Code, § 779; Maine, Rev. Stats. 1883, c. 73, § 6; Connecticut, Gen. Stats. 1866, p. 537, § 5; Rev. Stats. 1875, tit. 18, c. 6, § 4; Kentucky, Rev. Stats. 1852, c. 80, § 10; Massachusetts, Pub. Stats. c. 126, § 4; Michigan, Comp. Laws, 1857, c. 85, § 28; Annot. Stats. § 5544; Minnesota, Rev. Stats. c. 45, § 28; Comp. Laws, 1859, c. 31, § 28; Missouri, Rev. Stats. 1879, § 3943; New Jersey, Stats. tit. 10, c. 2, § 10; Tennessee, Code, 1858, § 2008; Mill & Vert. Code, § 2514. And see, also; Comp. Laws Kansas, 1879, c. 117, § 52; Mississippi, Code, 1880, § 1201; New Hampshire, Gen. Stats. 1867, c. 174, § 5; Gen. Laws, c. 193, § 5; New Jersey, Stats. tit. 10, c. 2, § 10; Rev. Stats. 1877, Descent, § 10; Rhode Island, Pub. Stats. 1882, c. 182, § 2; *Hopper v. Demarest*, 21 N. J. L. 525; *Goodrich v. Lampert*, 10 Conn. 448; *Dennett v. Dennett*, 40 N. H. 500; *Richardson v. Wheatland*, 7 Met. 169; *Williamson v. Williamson*, 18 Mon. B. 329; *Moore v. Littel*, 40 Barb. 488; 3 Wash. Real Prop. (5th ed.) p. 657. See for decisions affecting this rule, *Yarnall's Appeal*, 70 Pa. St. 342; *Adams v. Guerard*, 29 Ga. 675; 76 Am. Dec. 624; *Pierce v. Pierce*, 14 R. I. 514; *Hawkins v. Lee*, 22 Tex. 547; *Hancock v. Butler*, 21 Tex. 804; *Paxson v. Lefferts*, 3 Rawle, 59; *George v. Morgan*, 16 Pa. St. 95; *Powell v. Brandon*, 24 Miss. 364; *Ross v. Adams*, 28 N. J. L. 172; *Baker v. Scott*, 62 Ill. 86; *Steiner v. Kolb*, 57 Pa. St. 123; *Adams v. Ross*, 30 N. J. L. 512; 82 Am. Dec. 237; *Criswell's Appeal*, 41 Pa. St. 290; *Haldeman v. Haldeman*, 40 Pa. St. 35; *Halstead v. Hall*, 60 Md. 209; *Belslay v. Engel*, 107 Ill. 182; *Price v. Taylor*, 28 Pa. St. 102; 70 Am. Dec. 105; *Kepple's Appeal*, 53 Pa. St. 211; *Stump v. Jordan*, 54 Md. 619; *Price v. Sisson*, 13 N. J. Eq. 177; *Baker v. Scott*, 62 Ill. 86; *Bannister v. Bull*, 16 S. C. 220; *Brislain v. Wilson*, 63 Ill. 175; *Clark v. Smith*, 49 Md. 106; *Kleppner v. Laverty*, 70 Pa. St. 73; *Terrell v. Cunningham*, 70 Ala. 100; *May v. Ritchie*, 65 Ala. 602; *Flint v. Steadman*, 36 Vt. 210; *Oyster v. Oyster*, 100 Pa. St. 538; 45 Am. Rep. 388; *Warner v. Sprigg*, 62 Md. 14; *Adams v. Adams*, 6 Q. B. 860; *Pybus v. Mitford*, 2 Lev. 77; *Webster v. Cooper*, 14 How. 500; *Quillman v. Ouster*, 57 Pa. St. 125; *Doebler's Appeal*, 64 Pa. St. 17; *Tyler v. Moore*, 42 Pa. St. 374; *Ford v. Flint*, 40 Vt. 394; *Lees v. Mosley*, 1 Younge & C. 589; *Green-*



to their heirs and assigns." The *habendum* clause was to the grantee, "and to his lawful issue, to the only proper use of the said grantee, and his lawful issue (as above mentioned) forever." The deed also contained covenants of seisen, of quiet enjoyment, and against encumbrances, which were each with the grantee, "and his lawful issue." The court construed the deed as giving the grantee only a life estate.<sup>1</sup> The reasoning by which the court came to this conclusion is thus stated by Martin, J: "The elementary authorities uniformly hold that the word 'heirs' is indispensable to the creation by deed of an estate tail or fee simple; though it is otherwise in respect to a will. This requirement is technical; but it has always been a rule of property in this State, and must for manifest reasons be upheld. The contingent remainder is expressly limited to the brothers and their heirs. And it is plain that the word 'heirs,' found in the clause giving the remainder, cannot by construction be held to limit the estate granted, as is claimed, to Cline's issue. Such a transposition of the word would *ab initio* frustrate the apt words of the grant in remainder; for it would be to tack a remainder to an unconditional grant in fee simple. And it will also be noticed that the word 'heirs' as a correlative to Cline or his issue is not found in the *habendum* or warranty clauses, nor elsewhere in the deed. And it is proper to add, it is not imported by reference. Hence, the estate granted is not by the words of grant, or by anything within the four corners, limited to Cline and his heirs, nor to his issue and their heirs. But it is claimed that the particular estate was not alone for Cline's life, but was also for the respective lives of the survivors of his four children who were living at the date of the

wood v. Rothwell, 5 Man. & G. 628; Ridgeway v. Lamphear, 99 Ind. 251; Bagnall v. Harvey, 4 Barn. & C. 610; Abbott v. Jenkins, 10 Serg. & R. 296; Hennessy v. Patterson, 85 N. Y. 91; Ward v. Armory, 1 Curt. 419; Jones v. Miller, 13 Ind. 337; McIntyre v. McIntyre, 16 S. C. 290; Macumber v. Bradley, 28 Conn. 445; Carter v. McMichael, 10 Serg. & R. 429; George v. Morgan, 16 Pa. St. 95.

<sup>1</sup> Ford v. Johnson, 41 Ohio St. 366.

deed, in September, 1824. As to this, as well as to a suggestion that might be made of a fee by implication springing from the survival of issue, it is sufficient to say that, by the obvious intent and plan of the instrument, the particular estate was ended by the death of Cline, and the fee thereupon reverted, if it did not pass in remainder to the brothers. Consequently the estate granted was a life estate to Cline for his own life. But the result would be the same if the construction were to him and his four children as tenants in common; because, even if the words of grant are not inconsistent with a right of survivorship, it is certain that the right is not given expressly, nor, as we have seen, by implication."<sup>1</sup> In a case in Arkansas, a deed was made to a person "and the heirs of her body that now are or may hereafter be born." The deed provided that neither the grantee nor "her husband, nor either of her children that now are or may hereafter be born, nor any other person for them, shall have any power to sell said land during my natural life, or until the youngest child" of the grantee, "now or hereafter born, shall arrive at full age." The grantee, the court decided, took a life estate, and the remainder in fee upon her death became vested in her children that had survived her, and in the issue of those who had died, during her lifetime, *per stirpes*. During the life of the mother the children took nothing by the deed, nor was the interest of the children such during her life that it could be transmitted to her by their death.<sup>2</sup>

§ 848. Construction against grantor.—Where the language of the deed will admit of two constructions, the one less favorable to the grantor is to be adopted.<sup>3</sup> The rule

<sup>1</sup> Ford v. Johnson, 41 Ohio St. 366.

<sup>2</sup> Horsley v. Hilburn, 44 Ark. 458.

<sup>3</sup> Vance v. Fore, 24 Cal. 435; Hager v. Spect, 52 Cal. 579; Dunn v. English, 23 N. J. L. 126; Adams v. Frothingham, 3 Mass. 352; 3 Am. Dec. 151; Mills v. Catlin, 22 Vt. 98; Watson v. Boylston, 5 Mass. 411; Middleton v. Pritchard, 3 Scam. (4 Ill.) 510; 38 Am. Dec. 112; Cocheco Mfg. Co v. Whittier, 10 N. H. 305; Bushnell v. Proprietors, etc., 31 Conn. 150; Winslow v. Fatten, 34 Me. 25; Carrington v. Goddin, 13 Gratt.

is not modified by the fact that the deed was given under an award requiring it.<sup>1</sup> "It is an old principle of law that exceptions in a deed and every uncertainty are to be taken favorably for the grantee."<sup>2</sup> But this rule is not applicable to any case but one of strict equivocation, cases where the language of the deed is susceptible of two in-

587; *Charles River Bridge v. Warren Bridge*, 11 Peters, 589; *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38; 52 Am. Dec. 479; *Pray v. Briggs*, 2 Mill Const., 98; *Rung v. Shoneberger*, 2 Watts, 23; 26 Am. Dec. 95; *Foy v. Neal*, 2 Strob. 156; *Dodge v. Walley*, 22 Cal. 224; 83 Am. Dec. 61; *Salmon v. Wilson*, 41 Cal. 595; *Piper v. True*, 36 Cal. 606; *Pike v. Munroe*, 36 Me. 309; 58 Am. Dec. 751. And see *Sanborn v. Clough*, 40 N. H. 330; *Marshall v. Niles*, 8 Conn. 369; *Clough v. Bowman*, 15 N. H. 504; *Carroll v. Norwood*, 5 Har. & J. 155; *Johnson v. McMullan*, 1 Strob. 143; *Jackson v. Hudson*, 3 Johns. 375; 3 Am. Dec. 500; *Melvin v. Proprietors of Locks, etc.*, 5 Met. 15; 38 Am. Dec. 384; *Budd v. Brooke*, 3 Gill. 198; 43 Am. Dec. 321.

<sup>1</sup> *Bushnell v. Proprietors, etc.*, 31 Conn. 150. In *Dunn v. English*, 23 N. J. L. 126, the deed conveyed to the grantee two small parcels of land, "together, also, with the privilege and common use of the wagon alley between the houses of the said English and Branin, and through the yard of the said English to the back stable lot of the said Branin, and also the further use and privilege of a two and a half feet alley, or passageway, along and around the Treaton bank lot, to and from the dwelling-house lot of the said Branin to the stable lot of the said Branin. But if at any time hereafter the said dwelling-house lot, and the said stable lot of the said Branin, above mentioned, shall be owned by different persons, then and in that case the privilege and use of the said two and a half feet alley or passageway, and also the said wagonway to the said stable lot, shall cease and become null and void, and to revert again to the said Joshua English, his heirs and assigns. But the privilege of the wagonway between the dwellings to remain with the front house." The court stated the only question to be the extent of the right to the use of the alley. In the language of the court: "The plaintiff claims the right to pass through the alley between the houses to a gateway leading to his own lot, immediately in the rear of his house. The defendant insists that, by the terms of the grant, the right of the plaintiff is limited to the use of so much of the alley as lies immediately between the houses; that the passageway claimed by the plaintiff beyond the line of the rear of the house is consequently *extra viam*, and that he is entitled to no damages for its obstruction." The court held that the construction put upon the language of the instrument by the plaintiff was the true one, "because a grant is always to be construed, in cases of doubt, most strongly against the grantor, and most beneficially for the grantee."

<sup>2</sup> *Jackson v. Gardner*, 8 Johns. 394, 406. See *Grubb v. Grubb*, 101 Pa. St. 11.

terpretations.<sup>1</sup> And it has no application where the parties claim under the same deed;<sup>2</sup> nor to grants of the sovereign.<sup>3</sup> But a construction should, if possible, be adopted that will render all parts of the deed operative.<sup>4</sup> It is said by an English author: "This rule is often misunderstood; it does not mean that the words are to be

<sup>1</sup> *Adams v. Warner*, 23 Vt. 395, 412. *Abbie v. Huntley*, 56 Vt. 454, 458.

<sup>2</sup> *Coleman v. Beach*, 97 N. Y. 545.

<sup>3</sup> *Willion v. Berkley*, Plow. 243; *Jackson v. Reeves*, 8 Caines, 293. And see *Stourbridge Can. Co. v. Wheeley*, 2 Barn. & Adol. 792; *Leeds & Liverpool Can. Co. v. Hustler*, 1 Barn. & C. 424; *Blakemore v. Glamorganshire Can. Nav.*, 1 Mylne & K. 154; *Parker v. Great Western Ry. Co.*, 7 Man. & G. 253; *Barrett v. Stockton etc. Ry. Co.*, 2 Man. & G. 134; *Priestly v. Foulds*, 2 Man. & G. 194; *Mohawk Bridge Co. v. Utica & Sch. R. R. Co.*, 6 Paige, 554.

<sup>4</sup> *Waterman v. Andrews*, 14 R. I. 589; *Watters v. Bredin*, 70 Pa. St. 238; *Coleman v. Bush*, 97 N. Y. 545. See *Bent v. Rodgers*, 137 Mass. 192; *Presbrey v. Presbrey*, 13 Allen, 283; *Shultz v. Young*, 3 Ired. 385; 40 Am. Dec. 418; *Haven v. Dale*, 18 Cal. 359. In *Waterman v. Andrews*, *supra*, Mattoon, J., in delivering the opinion of the court, says: "It is laid down as a rule of construction that where there are two clauses in a deed which are so repugnant that they cannot stand together, the former is to prevail over the latter, unless there be some special reason to the contrary: Plow. 541; 1 Inst. 112 b; Shep. Touch. 88; Broom's Legal Maxims, \*580. But as Judge Metcalf remarks in 23 American Jurist, 277, the rule has very little operation in modern times, a reason to the contrary being almost always found. Nowadays, the rules of construction applied in cases of repugnancy give effect to every part of a deed, when consistent with the rules of law and the intention of the party. When this is impossible, the part which is repugnant to the intention is rejected. And whenever the language used is susceptible of more than one interpretation, the courts will look at the circumstances existing at the time of the transaction, such as the situation of the parties, the subject matter of the conveyance, the acts of the parties contemporaneous with and subsequent to the deed. To this extent extraneous evidence is admissible to aid in the construction of written contracts: *Wilson v. Troup*, 2 Cowen, 195; 14 Am. Dec. 458; *Parkhurst v. Smith*, Willes, 327, 332; *Bradley v. The Washington, Alexandria & Georgetown Steam Packet Co.*, 13 Peters, 89, 100-103; *Winnipiseogee Lake Cotton and Woolen Co. v. Perley*, 46 N. H. 83, 101; *Bell v. Woodward*, 46 N. H. 315, 331; *Gibson v. Tyson*, 5 Watts, 34, 41. If, after all, the interpretation to be given to the deed remains doubtful, the court will adopt the construction which is most favorable to the grantee, because it is the fault of the grantor that he has left the matter in doubt, and he ought not to be permitted to take advantage of a difficulty which he has himself created." See *Gilbert v. James*, 86 N. C. 244.

twisted out of their proper meanings, but only that where the words may properly bear two meanings, and where, after we have applied evidence, whether extrinsic or intrinsic, admissible under the foregoing rules, we are still unable to determine in which of these meanings they were used, we must take them in the meaning most disadvantageous to the person who uses them, unless the adoption of that meaning would work wrong.”<sup>1</sup> Where a jury is convinced of a spoliation, they should infer everything in favor of the deed and against the spoiler.<sup>2</sup>

§ 849. **Divers estates.**—From the rule stated in the preceding section, that a deed will be construed most strongly against the grantor, it results that the deed will be construed to convey to the grantee whatever interest and estate the grantor may have in the land at the time of the execution of the deed, unless the deed shows that the grantor’s intention was to pass a less estate.<sup>3</sup> If a person has divers estates in land, as, for instance, for life and in fee, any charge or grant made by him shall bind the whole estate.<sup>4</sup>

§ 849 a. **Deed of executor passing individual interest.** Where a person has an individual interest in land, and is also authorized as executor or in some other representative capacity to convey such land, a deed made by him, purporting to convey a complete title, but not referring to his representative character or to a power to sell in a will, conveys his individual interest only.<sup>5</sup> In a case where this rule was enforced, Mr. Chief Justice Scates remarked: “We must read, interpret, construe, and understand the deed, by and from its language and terms.”<sup>6</sup> Where there is no evidence to the contrary in a deed, it

<sup>1</sup> Elphinstone, *Interpretation of Deeds*, 94.

<sup>2</sup> *Diehl v. Emig*, 65 Pa. St. 320.

<sup>3</sup> *Stockett v. Goodman*, 47 Md. 54.

<sup>4</sup> *Stockett v. Goodman*, 47 Md. 54.

<sup>5</sup> *Cohea v. Hemingway*, 71 Miss. 222; 42 Am. St. Rep. 449.

<sup>6</sup> In *Davenport v. Young*, 16 Ill. 548; 63 Am. Dec. 320.

will be presumed to operate on the grantor's own right, if it appear that besides his own he has one in a representative character.<sup>1</sup>

§ 850. **Construction favorable to operation of deed.**— A deed should be considered as intended to have some effect, and a construction making it operative will be preferred to one rendering it void. "Some effect will, if possible, be given to the instrument, for it will not be intended that the parties meant it to be a nullity."<sup>2</sup> A mortgage described the land affected as "lot four of block one" of a certain farm, "being now used and occupied with the steam sawmill thereon, by the parties of the first part." This portion of the farm had been platted into four lots or blocks, which had not been subdivided. The mill was situated on the one which was numbered four on the plat, while the others were fenced in, used, and occupied with the mill. The court held that the words "of block one" should be rejected, and the mortgage was held a valid lien upon lot four. Said Mr. Justice Christiancy: "It is a rule as well founded, in reason as it is supported by authority, that deeds and other written instruments should be so construed as to render them valid and effectual, rather than void, *ut res magis valeat quam pereat*. But to construe this mortgage so as to make the tracts in question *blocks* instead of *lots*, would be to violate the plain meaning of words and the clear intent of the parties, and to ignore the whole subject matter in order to lay a foundation for violating this cardinal rule of construction."<sup>3</sup> Only unavoidable necessity should permit a construction to be placed upon a deed which requires the rejection of an entire clause.<sup>4</sup> If a

<sup>1</sup> *Coffing v. Taylor*, 16 Ill. 474.

<sup>2</sup> *Gano v. Aldridge*, 27 Ind. 294; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; *Anderson v. Baughman*, 7 Mich. 69; 74 Am. Dec. 699. See *Waterman v. Andrews*, 14 R. I. 589; *Piper v. True*, 36 Cal. 606.

<sup>3</sup> *Anderson v. Baughman*, 7 Mich. 69, 77; 74 Am. Dec. 699.

<sup>4</sup> *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38; 52 Am. Dec. 479; *Riggin v. Love*, 72 Ill. 556. See *Pool v. Blakie*, 53 Ill. 495; *Coleman v. Beach*, 97 N. Y. 545.

deed conveys land to a married woman without defining the estate, but in the *habendum* clause the estate is limited to her during her natural life, with a remainder to her husband, who is mentioned by name, and, in case he should die before his wife, then to his heirs at law, a life estate in the wife is created, and the husband takes the remainder in fee simple.<sup>1</sup> "The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object to the discovery and effectuating of which all the rules of construction, properly so called, are uniformly directed.

<sup>1</sup> *Riggin v. Love*, 72 Ill. 553. Reservations are considered as the language of the party for whose benefit they are made: *House v. Palmer*, 9 Ga. 497; *Cardigan v. Armitage*, 2 Barn. & C. 197; *Jackson v. Lawrence*, 11 Johns. 191; *Bullen v. Denning*, 5 Barn. & C. 842. And see, *Palmer v. Warren Ins. Co.*, 1 Story, 360; *Blackett v. Royal Exch. Assn. Co.*, 2 Crompt. & J. 244; *Hill v. Grange*, Plow. 171; *Donnell v. Columbian Ins. Co.*, 2 Sum. 366, 381; *Co. Litt.* 42 a. The language of the acknowledgment of the payment of the consideration in a deed was: "I, the said grantor, for and in consideration of the sum of one thousand dollars, in hand before the ensealing hereof, well and truly paid by Wanton Durfee, of the city and county of Providence, *subject to the life-estate of Mary L. Greene and Almira Durfee, both of Warwick, county of Kent, and Susan H. Greene, of the city and county of Providence, who jointly, or the survivors of them, shall be entitled to their fourths of the annual income of said estate, the other fourth of said income to be expended on said estate in betterments,* the receipt whereof I do hereby acknowledge, and am therewith fully satisfied, contented, and paid; and thereof, and of every part and parcel thereof, do exonerate, acquit, and discharge the said Wanton Durfee, Mary L. Greene, Almira Durfee, and Susan H. Greene, their heirs, executors, and administrators forever." Mr. Chief Justice Durfee, in delivering the opinion of the court, said: "The words in italics seemed to have been designed either to qualify the estate conveyed by the succeeding words, or else to recognize or refer to some qualification otherwise existing or made, or to be made by some other instrument. We think it is clear that they cannot qualify the estate conveyed, because they are ineffectual in themselves to create, and indeed do not purport to create, any estate, and because the succeeding words, being the operative words of the deed, make no reference to them, but convey the estate described absolutely and immediately to all the grantees in fee simple. The italicized words, in fact, do not affect in any way the construction of the deed. If they are of any use in the deed, they are of use only as notice to put people on inquiry, in case the estate is qualified by some other instrument, or by equitable intendment, or as evidence of some purpose still unaccomplished": *Durfee, Petitioners*, 14 R. L. 47.



When technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning; but this is not conclusive evidence that such was his real meaning. If the technical meaning is found in the particular case to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn inartificially, from ignorance, or inadvertence, or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known must be the guide, or the act and deed would not be the act and deed of the party, but of the court. Because the words which are the signs of the ideas of the persons using them are in general, and in the correct use of them, the signs of ideas, different from those of which in the particular case, they are found less technically and correctly, but with equal certainty to be the signs; can it follow that they are to be construed, to represent the ideas of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found in which technical meaning has been allowed to prevail, notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient to get over the presumption in favor of legal construction. The paramount regard to be had in a case circumstanced as the present, to the meaning and intention of the grantor, in preference to technical meaning, is the settled rule of construction. If the subject of the instrument on which the question arises be one that is not matter of law (over which intention has no control),

but depends wholly on the will and act of the party, such as the appointment by the donor in a deed of gift of his own donee; if the words to be construed are not words of limitation (in which a stricter attention to forms may be required, especially in deeds), but words of purchase and description, made use of to designate the person of the first taker; in such case, if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the object of grant, and if the words that he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the court to adopt the technical sense in opposition to the actual meaning of the party; on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form."<sup>1</sup> But under the strict rules applicable to the execution of deeds by attorneys in fact, a deed may be inoperative notwithstanding the intention of the parties, because it fails by a proper signature to bind the principal. A strong case illustrating the strictness of the early cases in this regard, is one where a party covenanted to sell and convey to another certain lots of land, and on the payment of the sum agreed upon to execute to him a good and sufficient deed. The agreement to sell and convey stated that it was the agreement of the principal by his attorney in fact, and that the principal covenanted to sell and convey, but the *testimonium* clause stated that the attorney, "as attorney of the party of the first part, and the said party of the second part, have hereunto set

<sup>1</sup> Plumer, M. R., in *Cholmondeley v. Clinton*, 2 Jacob & W. 91. An instrument which states that "I, A B, warrant and defend unto C D, her heirs and assigns forever, the receipt of which is hereby acknowledged, the following real estate, on this condition: I, the said A B, is to have and hold full possession of said lands during my natural life, and to hold appurtenances unto her, her heirs, and assigns forever," although it may be signed, sealed, and acknowledged, cannot operate as an effectual transfer, because it contains no words of grant: *Hummelman v. Mounts*, 87 Ind. 178.

their hands and seals," etc. The court decided that as the attorney had only affixed his own name the covenant was void.<sup>1</sup>

§ 850 a. **Merger of contract to convey in deed.**—The rule applicable to all contracts, that prior stipulations are merged in the final and formal contract executed by the parties, applies, of course, to a deed based upon a contract to convey. When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. "No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed."<sup>2</sup> A vendor, in a contract to sell, agreed to convey a good title, and subsequently executed a deed, which the vendee accepted in performance of the contract, knowing when he accepted the deed that the title to a part of the land was in the United States. It was decided that the previous contract was merged in the deed, and that the rights of the vendee must depend on the deed and not on the contract.<sup>3</sup> Where a lease is executed containing certain conditions, and the lessor, before its expiration, conveys the land by deed to the lessee, reciting the lease, but omitting all reference to the conditions, the lease is merged in the conveyance, and the title of the grantee is not encumbered with the conditions contained in the lease.<sup>4</sup> The acceptance by the vendee of a deed is considered as a full compliance with the contract to con-

<sup>1</sup> *Townsend v. Corning*, 23 Wend. 436, and cases cited. An interesting discussion as to the signature of deeds executed by attorneys in fact will be found in *Doe v. Doe*, 3 Am. Jur. 52, 77. See, for a discussion of signature by attorneys in fact, vol 1, §§ 377-381.

<sup>2</sup> *Slocum v. Bracy*, 55 Minn. 249; 43 Am. St. Rep. 499, per Mitchell, J.

<sup>3</sup> *Bryan v. Swain*, 56 Cal. 616.

<sup>4</sup> *St. Philip's Church v. Zion Presbyterian Church*, 23 S. O. 297.

vey, and as annulling it.<sup>1</sup> When the transaction has been fully closed, no allowance can be made because the quantity of land may be greater or less than that provided for in the prior contract.<sup>2</sup> So, it has been held, that if in the contract of sale the vendor reserves the timber growing on the land to be conveyed, and stipulates for the right to remove it within a specified time, but within the time so limited executes a warranty deed to the vendee, but fails to provide for the reservation, the vendee obtains the right to the timber.<sup>3</sup> An oral agreement, made prior to the sale, to secure an outstanding title is merged in the covenants of the deed.<sup>4</sup> A deed also merges all representations of freedom from encumbrance in the absence of fraud and of express or implied covenants.<sup>5</sup> The acceptance of the deed is, in the absence of fraud or mistake, considered the consummation of the contract between the parties, and therefore conclusive evidence of their agreement.<sup>6</sup>

<sup>1</sup> *Carter v. Beck*, 40 Ala. 599.

<sup>2</sup> *Cronister v. Cronister*, 1 Watts & S. 442.

<sup>3</sup> *Clifton v. Jackson Iron Co.*, 74 Mich. 183; 16 Am. St. Rep. 621. Said the court per Campbell, J: "Had no deed been made, it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity, the mistake might not be corrected. Neither need we consider whether, after such a deed, there might not be such dealings as to render such timber cutting lawful by license, express or implied. In this case there was no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties."

<sup>4</sup> *Coleman v. Hart*, 25 Ind. 256.

<sup>5</sup> *Fritz v. McGill*, 31 Minn. 536. See for other cases relating to the particular circumstances where this rule has been enforced, *Carter v. Beck*, 40 Ala. 599; *Gibson v. Richart*, 83 Ind. 313; *Davenport v. Whisler*, 46 Iowa, 287; *Jones v. Wood*, 16 Pa. St. 25; *Frederick v. Youngblood*, 19 Ala. 680; 54 Am. Dec. 209; *Houghtaling v. Davis*, 10 Johns. 297; *Davis v. Clark*, 47 N. J. L. 338; *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632; *Kerr v. Calvit, Walker*, 115; 12 Am. Dec. 537; *Williams v. Hathaway*, 19 Pick. 387; *Howes v. Barker*, 3 Johns. 506; 3 Am. Dec. 526; *Hunt v. Amidon*, 4 Hill, 345; 40 Am. Dec. 283; *Shontz v. Brown*, 27 Pa. St. 123.

<sup>6</sup> *Jones v. Wood*, 16 Pa. St. 25, and cases cited under the various notes to this section. But in *Houghtaling v. Lewis*, 10 Johns. 298, the court

§ 850 b. **Stipulation surviving the deed.**—There may be cases where the stipulation instead of becoming merged in the deed, survives it and confers an independent cause of action. Still, such cases come very closely to the border line of contradicting the general rule stated in the preceding section. A case where such stipulation is clearly not merged in the deed is that of a parol contract made by the vendor to refund the purchase money on failure of the vendee to acquire under the deed a good title to the property sold. Such an agreement is for indemnity against the consequences of the taking of the title that the deed may convey, and is therefore independent of the deed.<sup>1</sup> So it has been held, that if the grantor in a warranty deed promises to indemnify the grantee for any improvements that he may make in case the title should prove worthless, his promise is enforceable.<sup>2</sup> The purpose

say: "Articles of agreement for the conveyance of land are, in their nature, executory, and the acceptance of a deed, in pursuance thereof, is to be deemed, *prima facie*, an execution of the contract, and the agreement thereby becomes void, and of no further effect. Parties may, no doubt, enter into covenants collateral to the deed, or cases may be supposed when the deed would be deemed only a part execution of the contract, for the provisions in the two instruments clearly manifested such to have been the intention of the parties. But the *prima facie* presumption of law arising from the acceptance of a deed, is that it is an execution of the whole contract; and the rights and remedies of the parties, in relation to such contract, are to be determined by such deed, and the original agreement becomes null and void." But inasmuch as in that case the court held that the proof was conclusive that the deed was accepted in full satisfaction of the agreement, the language quoted can scarcely be taken as making the decision an exception to the rule stated in the text. It was held in *Speed's Executors v. Hann*, 1 T. B. Mon. 16; 15 Am. Dec. 78, in conflict with the general rule, that articles of agreement did not become merged in a deed executed subsequently. Attention should also be called to the case of *Donlon v. Evans*, 40 Minn. 501, but this case is explained and distinguished in the later decision by the same court of *Slocum v. Brady*, 55 Minn. 249; 43 Am. St. Rep. 499. See, also, *Porter v. Noyes*, 2 Greenl. 22; 11 Am. Dec. 30. Parol evidence is inadmissible to show conversations between the parties prior to the execution of the deed: *Smith v. Fitzgerald*, 59 Vt. 451; 9 Atl. Rep. 604. See, also, *Carr v. Hays*, 110 Ind. 408; 11 N. E. Rep. 25.

<sup>1</sup> *Close v. Zell*, 141 Pa. St. 390; 23 Am. St. Rep. 296.

<sup>2</sup> *Richardson v. Gosser*, 26 Pa. St. 335. In answer to the argument that the contract concerning improvements became merged in the deed,

for which a deed was executed may be shown. Thus, where a railroad company represented that a right of way was designed for the main line and not for sidetracks, and the right of way is subsequently used for sidetrack purposes, the purpose for which the deed was executed may be shown by parol evidence. In such a case, however, its use will not be enjoined, but the grantor may recover damages for any excessive injury sustained over that which would arise from the use represented.<sup>1</sup> Where, as a part of the consideration of the sale, a parol agreement is made restricting the use of the land in some particular for a specified time, it is not merged in the deed. The title is not affected by it, and such an agreement may be proven by parol evidence.<sup>2</sup>

**§ 850 c. Deed correcting prior deed.**—The rule prevailing with reference to contracts to convey, that all prior stipulations of the parties are merged in the deed finally delivered and accepted, also prevails where a second deed has been executed as a substitute for, and a correction of, a prior deed.<sup>3</sup> If the deed delivered as a substitute omits lands contained in the prior conveyance, the grantee and his heirs are estopped from claiming them.<sup>4</sup> Where a subsequent deed has been executed in place of a prior deed misdescribing the land intended to be conveyed, the possession by the grantor of the land first conveyed is

the court said: "But to us it appears that the contract on which this suit is founded has no such relation to the deed referred to. It does not concern the sale or the transfer of the title. It is a promise to do another thing." For other cases on the same point see *Drinker v. Byers*, 2 Penr. & W. 528; *Anderson v. Washabaugh*, 43 Pa. St. 115; *Robinson v. Bakewell*, 25 Pa. St. 424; *Brown v. Moorhead*, 8 S. & R. 569; *Walker v. France*, 112 Pa. St. 203; *Frederick v. Campbell*, 13 S. & R. 136; *Cox v. Henry*, 32 Pa. St. 18.

<sup>1</sup> *Donisthorpe v. Fremont etc. R. R. Co.*, 30 Neb. 142; 27 Am. St. Rep. 387.

<sup>2</sup> *Hall v. Solomon*, 61 Conn. 476; 29 Am. St. Rep. 218.

<sup>3</sup> *Chloupek v. Perotka*, 89 Wis. 551; 46 Am. St. Rep. 858; *Emeric v. Alvarado*, 64 Cal. 529. And see *Hutchinson v. Chicago etc. Ry. Co.*, 41 Wis. 541.

<sup>4</sup> *Chloupek v. Perotka*, 89 Wis. 551; 46 Am. St. Rep. 858.

adverse to the grantees.<sup>1</sup> If a grantee accepts a deed of correction in lieu of a prior deed executed by the grantor, and the grantee sells the land conveyed to him by the subsequent deed, he is estopped from claiming title to the land conveyed by the prior deed. His acceptance of the second deed constitutes an election to take the land conveyed by the corrected deed, and operates as a relinquishment of title to the land conveyed by the first deed, as one who accepts the benefits of a conveyance must adopt the whole of it.<sup>2</sup>

§ 851. **Contemporaneous exposition.**—A deed should receive a fair and reasonable construction which will effectuate the intention of the parties, and a contemporaneous exposition of the deed is always entitled to the greatest consideration.<sup>3</sup> Unless a contrary intent is manifest, a deed should be construed in all its parts with respect to the actual, rightful state of the property at the time at which the deed is executed.<sup>4</sup> A deed will not be declared void for uncertainty until it has been examined in the light of contemporaneous facts. When from these facts a clear intention can be gathered, and the words of the instrument by fair interpretation are susceptible of a construction to uphold such intention, the words will be so construed, and the instrument enforced.<sup>5</sup> Where a deed purporting to convey a strip of land of a specified width along a line already designated does not give the lateral

<sup>1</sup> *Fox v. Windes*, 127 Mo. 502; 48 Am. St. Rep. 648.

<sup>2</sup> *Fox v. Windes*, 127 Mo. 502; 48 Am. St. Rep. 648.

<sup>3</sup> *Connery v. Brooke*, 73 Pa. St. 80. See *Winnipiseogee v. Perley*, 44 N. H. 83; *Putzel v. Van Brunt*, 40 N. Y. Sup. Ct. 501; *Hamm v. San Francisco*, 17 Fed. Rep. 119; *Stone v. Clark*, 1 Met. 378; 35 Am. Dec. 370.

<sup>4</sup> *Pollard v. Maddox*, 28 Ala. 325; *Richardson v. Palmer*, 38 N. H. 218; *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489; *Moore v. Griffin*, 22 Me. 350; *Abbott v. Abbott*, 51 Me. 581; *Commonwealth v. Roxbury*, 9 Gray, 493; *Stanley v. Green*, 12 Cal. 148. And see *Adams v. Frothingham*, 3 Mass. 352; 3 Am. Dec. 151; *Lane v. Thompson*, 43 N. N. 324; *Rider v. Thompson*, 23 Me. 244; *Karmuller v. Krotz*, 18 Iowa, 352; *Commonwealth v. Roxbury*, 9 Gray, 493, and n. 525; *Hall v. Lund*, 1 Hurl. & C. 684; *Roberts v. Roberts*, 55 N. Y. 275.

<sup>5</sup> *Stanley v. Green*, 12 Cal. 148.



boundaries, and fails to designate the particular part of such strip traversed by such line, and the grantee enters into possession under the deed, and marks the lateral boundaries by the erection of fences, and retains possession for several years, with the grantor's consent and acquiescence, the parties thus place a practical construction upon the deed, and this construction binds both the parties and those claiming under them.<sup>1</sup>

§ 852. **Election of grantee.**—Where a deed may operate in two different ways, the grantee may elect as to which one of the ways it shall operate. This is but the statement in another form that the deed shall be construed most strongly against the grantor, or at least a consequence of this rule. “Where a deed may inure in different ways, the grantee shall have his election which way to take it. An exception in a deed is always to be taken most favorably for the grantee; and if it be not set down and described with certainty, the grantee shall have the benefit of the defect.”<sup>2</sup> “The general rule is, that of everything uncertain which is granted, election remains to him to whose benefit the grant was made to make the same certain.”<sup>3</sup> But where a grantor conveyed “a certain lot of land situate on my home farm in Winslow, and on the west side of the road leading to Augusta, to be selected by said Grover (the grantee) or his assigns, anywhere on my said farm west of said road, and if the location of the lot of land should be at a distance from said road, a good and sufficient passageway from said road to

<sup>1</sup> *Messer v. Oestreich*, 52 Wis. 684. See, also, *Whitney v. Robinson*, 53 Wis. 309. A deed which exhibits on its face its own invalidity cannot be made the basis of an action: *Welton v. Palmer*, 39 Cal. 456.

<sup>2</sup> *Jackson v. Myers*, 3 Johns. 388; 3 Am. Dec. 500, per Kent, C. J. See, also, *Esty v. Baker*, 50 Me. 331; 79 Am. Dec. 616; *Melvin v. Proprietors of Locks*, 5 Met. 27; 38 Am. Dec. 384.

<sup>3</sup> *Armstrong v. Mudd*, 10 Mon. B. 144; 50 Am. Dec. 545; Vin. Abr. vol. 14, p. 49. See, also, *Jackson v. Blodgett*, 16 Johns. 172; *Jackson v. Gardner*, 8 Johns. 394; 2 Hilliard on Real Prop. (2d ed.) 327; 2 Greenl. Cruise on Real Prop. 605; Willard on Real Estate and Conveyancing, 403; *Pollard v. Maddox*, 28 Ala. 321.

the place where said lot may be selected, and never obstructed by me or my heirs or assigns, the said lot to contain one acre in such shape as said Grover or his assigns may choose, all to be according to my bond to John Reed, of Clinton, dated Oct., 1836, reference thereto being had, will fully appear, said one acre is supposed to contain a ledge of limestone or marble," and at the time of the execution of the deed, there was upon the land a ledge of limestone or marble, and at a distance from the ledge, a dwelling-house, barn, and other buildings, it was held that the grantee was not entitled to locate his acre in such a manner as to include a ledge of limestone or marble, and thence to run a narrow strip of land to the buildings, and embrace within his acre lot the land on which the buildings were erected.<sup>1</sup>

**§ 853. Passing present interest with other provisions to take effect upon death of grantor.**—We have already discussed very fully the effect of instruments in the form of absolute deeds which were not to take effect until after the death of the grantor.<sup>2</sup> But the deed may pass a present interest in the land to the grantee for life, and may also contain provisions to take effect by way of contingent remainder, upon the grantor's death, during the life of the grantee. In such a case the question would arise whether the instrument is to be considered as a conveyance, or is to be deemed of a testamentary character only.

<sup>1</sup> *Grover v. Drummond*, 25 Me. 185. A deed is conclusive evidence of the contract, so far as the instrument is intended to pass or extinguish a right, and concludes the parties; but the deed is not conclusive evidence as to facts acknowledged, such as the date, payment of consideration, etc: *Rhine v. Ellen*, 36 Cal. 362. The recital of collateral facts in a deed not essential to its validity does not estop a party from denying them: *Ingersoll v. Truebody*, 40 Cal. 603. Parties exchanged lands, and executed deeds. Each deed contained a clause of general warranty, and also a stipulation that in case the grantee was ousted, the deed should be void, and he should have the right to re-enter, possess, and own the land given in exchange. It was held that when a party was ousted, he had the right to elect whether he would re-enter or rely on his warranty: *Pugh v. Mays*, 60 Tex. 191.

<sup>2</sup> See §§ 279-283.

The rule is, that where the deed passes a present interest, such contingent provisions do not convert it into a will. The grantor cannot revoke such limitations, nor do they become void by his subsequent marriage.<sup>1</sup> Where land is conveyed to a person, the deed containing the clause, "but should he die without a wife, or children, or child, then said land shall pass according to the statutes of descent and distribution of the State," then in force, those who are the surviving heirs of the grantee, in case he dies without having married, take by purchase under the deed and not by descent or inheritance from him.<sup>2</sup> Where a person intends that a deed shall take effect on execution, adopting that mode of distributing his property rather than by will, the deed is an effectual conveyance.<sup>3</sup>

§ 854. **No present interest passing.**—But where no present interest passes by the deed, the rule is altogether different. The instrument then, while in form a deed, is in substance a will, possessing all the incidents of a will. Thus, a deed in the usual form, containing the clauses, "to commence after the death of both of said grantors," and also, "it is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the grantors or

<sup>1</sup> *Brown v. Mattocks*, 103 Pa. St. 16. "Many deeds," said Mr. Justice Paxton, "conveying and settling property contain provisions which become operative only after the death of the grantor or settler, but where a present interest passes to a trustee or the grantee, it has never been supposed that such instruments were of a testamentary character": *Brown v. Mattocks*, 103 Pa. St. 16. And see *Ohandler v. Chandler*, 55 Cal. 267; *Rexford v. Marquis*, 7 Lans. 248.

<sup>2</sup> *Robinson v. Le Grand*, 65 Ala. 111; *Phillips v. Thomas Lumber Co.*, 94 Ky. 445; 42 Am. St. Rep. 367; *Cable v. Cable*, 146 Pa. St. 451; *Seals v. Pierce*, 83 Ga. 787; 20 Am. St. Rep. 344; *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147; *White v. Hopkins*, 80 Ga. 154.

<sup>3</sup> *Brown v. Atwater*, 25 Minn. 520. But where he reserves the power to reinvest the title in himself at his pleasure, there is really no delivery, and the deed does not pass title: *Miller v. Lullman*, 81 Mo. 311. But a *habendum* clause may have the effect of limiting the estate conveyed so that the title shall revert to the grantor in case he survives the grantee, and shall vest absolutely in the grantee in the event of the grantor's prior death: *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404. See section 215, *ante*.

either of them shall live," does not create a present interest to commence at a future day, but is testamentary in character. Notwithstanding the payment of a valuable consideration, the grantors have the right of revocation at their option.<sup>1</sup> So, a deed made upon the express condition that "the conveyance of land herein named shall be and continue the property of the first party during his lifetime, and the remainder to said second party immediately at the death of said first party, but in the event of the death of the second party before the said first party, then the estate herein shall go to said first party as before," is a mere devise, which may be revoked at will, and conveys no title.<sup>2</sup> And if, in such a case, the grantor promise to pay the grantee a sum of money to reconvey the land, the promise is without consideration.<sup>3</sup>

§ 855. **Tendency to uphold deed.**<sup>4</sup>—It seems to be impossible to lay down an invariable rule which will apply

<sup>1</sup> *Leaver v. Gauss*, 62 Iowa, 314. Said the court, per Adams, J: "We do not forget that the statute provides that 'estates may be created to commence at a future day': Code, § 1933. But we have to say, that any language employed by the grantor, which would be sufficient to create an estate to commence at a future day, would, in the nature of the case, give a present interest in the property. The estate would stand created, and the enjoyment postponed. A declaration that the grantee takes no interest during the life of the grantor is equivalent, we think, to a declaration that no estate is created. The instrument, it is true, evinces an intention favorable to the grantee, but that intention is, in substance, only testamentary, and is, of course, subject to revocation, if, indeed, a revocation is needed to prevent it from becoming operative. The object of the defendant's averment that a valuable consideration passed, was to give the instrument a present operation as binding the property. It was of no consequence in any other respect. If the court below had held that it was proper to plead and prove such fact, it would have held, virtually, that an express provision of the instrument could be overturned. We can conceive that a valuable consideration might pass as an inducement to the person receiving it to make a devise. If a devise in form should be made under such inducement, the instrument by which it should be made would still be testamentary, and being such, would be revocable."

<sup>2</sup> *Bigley v. Souvey*, 45 Mich. 370.

<sup>3</sup> *Bigley v. Souvey*, 45 Mich. 370. For cases where the question arose whether an instrument should be treated as a deed or a will, see §§ 309, 309 a, and notes *ante*.

<sup>4</sup> This section is cited with approval in *Faivre v. Daley*, 93 Cal. 671.

to all cases. There is, it is to be observed, however, a tendency in the modern decisions to uphold conveyances when not clearly repugnant to some well-defined rule of law. Some cases occur when the mind may incline to one side or to the other. As illustrating this tendency to effectuate the intention of a grantor, we may select an instance where a deed, after granting certain land to the grantor's wife, thus proceeded: "This deed is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me, and if she shall survive me, then, and in that event only, this deed shall be operative to convey to my said wife said premises in fee simple. Neither I, the grantor, nor the said Clarissa B. Abbott, the grantee, shall convey the above premises, while we both live, without our mutual consent. If I, the grantor, shall abandon or desert my said wife, then she shall have the sole use and income and control of said premises during her life." Then followed the usual *habendum*, and also covenants of seisin against encumbrances and warranty. The court decided that the deed should be upheld as creating a feoffment to commence *in futuro*; that it was more than a devise in a will because it conveyed to the grantee a contingent right, which could not be taken from him.<sup>1</sup> It was contended in the case just cited that to recognize the validity of the deed would be to contravene principles of public policy, because, it was claimed, the deed was an attempt to evade the statutes regulating the making and execution of wills. To this argument, Mr. Justice Barrows, in delivering the opinion of the court, made this answer: "But the instrument was duly executed by the defendant's testator, a man capable of contracting, and having an absolute power of disposition over his homestead farm, subject only to the rights of his existing creditors. It was duly recorded, so

<sup>1</sup> *Abbott v. Holway*, 72 Me. 298.

that all the world might know what disposition he had made of a certain interest in it, and what was left in himself. If operative at all, it operated differently from a will. A will is ambulatory, revocable. Whatever passed to the wife by this instrument became irrevocably hers. We fail to perceive that any principle of public policy, or anything in the statute of wills, calls upon us to restrict the power of the owner of property, unencumbered by debt, to make gifts of the same, and to qualify those gifts as he pleases, so far as the nature and extent of them are concerned. Public policy, in this country, has been supposed rather to favor the facilitation of transfers of title, and the alienation of estates, and the exercise of the most ample power over property by its owner that is consistent with good faith and fair dealing. The selfish principle may fairly be supposed to be, in all but exceptional cases, strong enough to prevent too lavish a distribution of a man's property by way of gift."<sup>1</sup> Another instance indicating the same tendency may be given. A father gave and granted to his daughter, in consideration of love and affection, "all that tract of land constituting his residence in said county, to have and to hold the aforesaid premises after his death, during her natural life." The grantor reserved the right of controlling the premises during his lifetime, and stated in the instrument his desire that at his daughter's death the property should be "sold and divided between the balance

<sup>1</sup> *Abbott v. Holway*, 72 Me. 298, 304. See as to effect of the statute of uses upon the statute regulating conveyances of real estate in Maine, *Wyman v. Brown*, 50 Me. 139. An instrument declaring that it is a will, but containing words indicating an intention to transfer the estate of the grantor, and containing the names of the parties, description of the property and other formal essentials of a deed, is a sufficient conveyance: *Evenson v. Webster*, 3 S. Dak. 382; 44 Am. St. Rep. 802. If a sister, after the execution of such an instrument, signs a document to the effect that she will not make any claim on the property, she is estopped from subsequently asserting any claim thereto: *Evenson v. Webster*, 3 S. Dak. 382; 44 Am. St. Rep. 302. Where the intention of the parties appears upon the face of the deed, effect should be given to it regardless of technical rules of construction: *Faivre v. Daley*, 93 Cal. 664.

of his children." The court said that it did not know what the instrument was, but finally held it to be a deed.<sup>1</sup> Its language on the construction of the instrument was: "It is not easy to say what this instrument is. It has the form and general requisites of a deed, including attestation. Construed as a deed, it would have validity, and take effect; construed as a will, it would be a nullity, as it has but two witnesses, and the law requires three. We do not certainly know what it is. Its construction is very doubtful. Taking all its terms together, it would seem that the grantor intended to pass something presently, for he defines what it was his purpose to reserve, namely, the control during his own life. By control he most probably meant possession, use, and enjoyment; not absolute title, with power of disposition beyond the term of his own life. To hold the instrument to be a will would be to make the reservation altogether idle and useless. By holding it to be a deed, effect can be given to the reservation as a part of the instrument to all the words, without rejecting any as superfluous. This, we think, is the safer and better construction."<sup>2</sup> It has been held, however, that a grantor may in his deed reserve the power to revoke the grant. Such a condition is not contrary to public policy. The deed gives notice to the creditors of the grantee of the reservation of the power of revocation, and it cannot be attacked on the ground that it enables the parties to defeat the rights of the creditors.<sup>3</sup> If the grantor has presented as a part of the mode of revocation some formality not recognized by law as es-

<sup>1</sup> *Dismukes v. Parrott*, 56 Ga. 513.

<sup>2</sup> *Dismukes v. Parrott*, *supra*. That the expressions of the grantor's motive cannot control the legal effect of a deed, see § 838, and notes, *ante*. So in *Cross v. Weare Commission Co.*, 153 Ill. 499, 46 Am. St. Rep. 902, it was held that where a conveyance cannot operate as the kind intended, it may operate in some other form so as to effectuate the purpose, which, considering the whole instrument and the circumstances and condition of the title, appears to have been the intention of the parties.

<sup>3</sup> *Ricketts v. Louisville etc. Ry. Co.*, 91 Ky. 221; 34 Am. St. Rep. 178. See, also, *Nichols v. Emery*, 109 Cal. 323.



sentia], the power is not to be deemed impossible if executed for that reason.<sup>1</sup>

§ 855 a. **Deed or will—Some illustrations.**—We have, in the preceding sections, stated the general principles by which it may be determined whether an instrument is a deed or a will. We have, in another place, discussed the question of the effect that delivery will have in deciding whether an instrument should be treated as a deed or a will.<sup>2</sup> But it must be confessed that the rules, as they are applied by the courts, are rather shadowy, and it is almost impossible to lay down a rule with which some well-considered case will not be found to be in conflict. Mr. Chief Justice Stone has expressed the confused condition of the law very aptly when he says: "There are few, if any, questions less clearly defined in the law-books than an intelligible, uniform test by which to determine when a given paper is a deed and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death. Out of this has grown one of the tests of testamentary purpose—namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession, enjoyment, or usufruct on the donee or grantee during the life of the maker, are always wills, and never deeds, this would seem to be a simple rule and easy of application. The corollary would also appear to result naturally and necessarily, that if the instrument, during the lifetime of the maker, secured to the grantee any actual

<sup>1</sup> *Ricketts v. Louisville etc. Ry. Co.*, 91 Ky. 221; 34 Am. St. Rep. 176. See, also, *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404, and § 215 *ante*.

<sup>2</sup> §§ 309, 309 a. See, also, §§ 279–283.

use, possession, enjoyment, or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule."<sup>1</sup> The language just quoted correctly describes the contrariety that prevails among the decisions. The importance of the subject, however, will justify us in calling to the reader's mind some of the cases in which the question whether an instrument is a deed or a will was before the court for determination. Where a deed provided that it should go into full force and effect at the grantor's death, it was held to be a valid deed, which conveyed a present title to the grantee, but postponed the right of possession and use of the property until the grantor's death.<sup>2</sup> So, where the grantor reserves and excepts from the grant "all the estate in said lands, and the use, occupation, rents, and proceeds thereof, unto himself during his natural life," a present interest is conveyed, and the deed is effectual.<sup>3</sup> A grantor declared in his deed that it was not to take effect until after his death, and was "not to be recorded until after my decease," but the court decreed it was a valid conveyance, and was not testamentary in character.<sup>4</sup>

**§ 855 b. Same subject—Further illustrations.**—An instrument will be declared to be a deed where it contains all the terms and provisions of one, although it may contain a clause that the grantor and his wife are to retain the use, benefit, and control of the land conveyed during their natural lives.<sup>5</sup> Land was conveyed by the owner to one of his sons as trustee, upon trust to sell it within a specified time, and, after the grantor's death, to divide the proceeds in certain designated proportions to the grantor's children, and to invest the remaining part for the benefit

<sup>1</sup> *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28. The learned justice cites section 983 of this treatise, and also many cases bearing upon the question before the court.

<sup>2</sup> *Bunch v. Nicks*, 50 Ark. 367.

<sup>3</sup> *Cates v. Cates*, 135 Ind. 272.

<sup>4</sup> *Shackelton v. Seabee*, 86 Ill. 616.

<sup>5</sup> *Bass v. Bass*, 52 Ga. 501.

of another child of the grantor. The grantor, in the deed, reserved a power of revoking the trust, but remained in possession of the land during his life without exercising the power of revocation. The conveyance, it was decided, passed immediately a vested interest to the trustee, in whom was placed the whole estate necessary for the trust. The grantor, in effect, retained the equivalent of a life estate during his own life, which entitled him to remain in possession of the land, or to lease it and retain the profits. Its character as a deed was not changed or destroyed by the power of revocation, nor did this power operate to convert it into a testamentary disposition of property.<sup>1</sup> A clause that "the condition of this deed is such that I hereby reserve all my right, title, and interest in the aforesaid described pieces of land, with all the buildings thereon during my natural life," is to be considered as a reservation creating a life estate, and not as impairing the efficacy of the instrument as a conveyance of title.<sup>2</sup> A conveyance is not converted into a will because it contains a clause that "this conveyance to be put to record, but not to take effect so as to give possession until after my death."<sup>3</sup> Although the deed may be a voluntary conveyance, yet if it conveys to the grantee a present interest, but postpones the enjoyment of possession, the grantor cannot, after its execution, defeat the title of the grantee.<sup>4</sup> Such deeds reserving a life estate in the grantor are irrevocable after execution.<sup>5</sup> A deed reciting that "the above obligation to be of no more effect until after the death of" the grantor and his wife, "then to be in full force," passes a present interest in the land, and will not be treated as a will.<sup>6</sup> So, language in a deed that it is to take after the grantor's death, and not before, will

<sup>1</sup> *Nichols v. Emery*, 109 Cal. 323.

<sup>2</sup> *Graves v. Atwood*, 52 Conn. 512; 52 Am. Dec. 610.

<sup>3</sup> *Rawlings v. McRoberts*, 93 Ky. 346.

<sup>4</sup> *McDaniels v. Johns*, 45 Miss. 632; *Mattocks v. Brown*, 103 Pa. St. 16.

<sup>5</sup> *White v. Hopkins*, 80 Ga. 154.

<sup>6</sup> *Wilson v. Carrico*, 140 Ind. 533; 49 Am. St. Rep. 533.

not change its nature, but will be construed as a declaration that the grantee's use and enjoyment are to be postponed until the grantor's death.<sup>1</sup> The essential characteristic of a will is that it becomes effective only upon the death of the maker, and that by it he has divested himself of no part of his estate; and no title has become vested in any other person. To render the instrument a deed some interest must pass immediately, but an immediate enjoyment of the interest conveyed is not necessary. The commencement of the future enjoyment may be made dependent upon the ending of an existing life or lives, or upon the termination of some intermediate estate.<sup>2</sup> A deed is valid which is made upon the express provision that the grantors may have and retain the entire use and control of the premises so long as they, or either of them, may live.<sup>3</sup> The rule is that a present interest must pass. A vested right must be created, but the postponement of the use or enjoyment of this vested right will not affect the deed as a valid conveyance.<sup>4</sup>

§ 855 c. **When a will.**—But to have the effect of a deed, the instrument must convey a present interest. If it states that the grantee shall have no interest in the property so long as the grantor shall live, this essential is wanting, and it becomes testamentary in character and may be revoked by the grantor.<sup>5</sup> An instrument directing the beneficiary to pay the maker's debts and to retain

<sup>1</sup> *Owen v. Williams*, 114 Ind. 179.

<sup>2</sup> *Nichols v. Emery*, 109 Cal. 323.

<sup>3</sup> *Chandler v. Chandler*, 55 Cal. 267.

<sup>4</sup> *Moye v. Kittrell*, 29 Ga. 677; *Wilson v. Carrico*, 140 Ind. 533; 49 Am. St. Rep. 213; *Wyman v. Brown*, 50 Me. 139; *Dreisbach v. Serfass*, 126 Pa. St. 32; *Brown v. Atwater*, 25 Minn. 520; *Webster v. Webster*, 33 N. H. 18; 66 Am. Dec. 705; *Watson v. Watson*, 22 Ga. 460; *Johnson v. Hines*, 31 Ga. 720; *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147; *Abbott v. Hoiway*, 72 Me. 98; *Swails v. Bushart*, 2 Head, 560; *Blanchard v. Morey*, 56 Vt. 170; *Owen v. Williams*, 114 Ind. 179; *Meek v. Holton*, 22 Ga. 491; *Bunn v. Bunn*, 22 Ga. 472; *Dismukes v. Parrott*, 56 Ga. 513; *Jenkins v. Adcock*, 5 Tex. Civ. App. 466; *Mitchell v. Mitchell*, 108 N. C. 542; *Gorham v. Daniels*, 23 Vt. 600.

<sup>5</sup> *Leaver v. Gauss*, 62 Iowa, 314; *Bigley v. Souvey*, 45 Mich. 370.

the residue left after this is done, and providing that it is not to take effect until the grantor's death, although it may, by its own language, be characterized as a deed, and may be acknowledged as such, will be treated as a testamentary disposition of property, because it passes no present interest in the property.<sup>1</sup> If a grantor, in an instrument purporting to be a deed, reserves "all the within-named estate, both real and personal, during his natural life," and it appears that the intention of the maker was that it should become operative only on his death, it cannot take effect as a deed, but must be considered a testamentary disposition of the property.<sup>2</sup> If the grantor retains the right of ownership until his death, and declares in the instrument that upon his death the deed shall take effect, it is not valid as a deed, but must be treated as a will.<sup>3</sup> Although the deed may contain present words of gift, yet if it contains other clauses showing that a life estate is reserved, and that the gift is not to take effect until the grantor's death, it may be converted into a will. Thus, where a husband and wife made such a deed of the wife's separate estate to their children, and it was provided that the gift was to take effect at her death, and that her husband, as her executor, should keep the property for a specified time for the benefit of the children until the estate can be wound up, when the gifts were to be distributed, these clauses convert it into a will and destroy its character as a deed.<sup>4</sup> If the instrument contain a condition, performance of which will cause the property to revert to the grantor, and provides that after his death it shall be divided share and share alike between designated relatives, it is invalid as a deed.<sup>5</sup> The rule to be deduced from the authorities may be stated to be that where no present interest becomes vested by the instrument, but it directs what is to be done after the maker's death, or

<sup>1</sup> *Cunningham v. Davis*, 62 Miss. 636.

<sup>2</sup> *Carlton v. Cameron*, 54 Tex. 72; 38 Am. Rep. 620.

<sup>3</sup> *Walker v. Jones*, 23 Ala. 448; *Bigley v. Souvey*, 45 Mich. 370.

<sup>4</sup> *Mosser v. Mosser*, 32 Ala. 551.

<sup>5</sup> *Mallery v. Dudley*, 4 Ga. 32.

becomes operative only in that event, it is to be considered a testamentary disposition of property, notwithstanding the intention of the parties was to execute a deed.<sup>1</sup>

§ 856. **Conveyance of estate not owned by grantor.** While on this subject, we may consider the effect of a conveyance of land owned by the grantor at the time of his death, but not owned at the time of the execution of the deed. A case in Maine will illustrate the construction to be placed upon deeds of this character. Four years before the grantor's death he executed a deed conveying "all the estate, wherever situated, that I now own, or may own at the time of my decease." The deed also contained the clauses: "A list of the several pieces or lots of land will be found with my papers. This deed to have full effect immediately before my decease." The deed, the court held, conveyed only such of the land owned by the grantor at the date of the deed as he continued to own when it took effect, and it did not convey any real estate acquired by the grantor after the execution of the conveyance.<sup>2</sup> "It is a cardinal rule," said Mr. Justice Dickerson, "that deeds are to be so construed as to give effect to the intention of the parties. The intention must be intelligible and consistent with the rules of law. If an instrument in writing upon its face purports to pass the title to land in such manner and form as by the rules of law can only be done by will, it cannot be sustained as a deed. A deed given to take effect *in futuro*, upon its subsequent delivery, or some future contingency, may not convey the same property that a deed having the same description conveys, when it takes effect at the time of its execution. Between the time of execution and the time

<sup>1</sup> *Millican v. Millican*, 24 Tex. 427; *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203; *Gage v. Gage*, 12 N. H. 371; *Brewer v. Baxter*, 41 Ga. 212; 5 Am. Rep. 530; *Turner v. Scott*, 51 Pa. St. 126; *Watkins v. Dean*, 10 Yerg. 320; 31 Am. Dec. 583; *Hall v. Bragg*, 28 Ga. 330; *Symmes v. Arnold*, 10 Ga. 506; *Shepherd v. Nabors*, 6 Ala. 631; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159; *Dunne v. Bank of Mobile*, 2 Ala. 152.

<sup>2</sup> *Libby v. Thornton*, 64 Me. 479.

of taking effect, the grantor may have conveyed a part or the whole of the property intended to be conveyed to a *bona fide* purchaser, who holds it under a recorded deed; or it may have been taken on execution. In such cases, the grantee acquires title to such part of the land only as remains the property of the grantor when the deed takes effect. The intention to be regarded must be one existing in the minds of the parties when the deed is executed. When the question arises with respect to what particular land the deed conveys, the inquiry is, What did the grantor intend to convey and the grantee to receive? Their intention in this respect is to be ascertained from the description in the deed. If the subject of the grant cannot be identified from that, the grant becomes void for uncertainty." The justice observed that it was unnecessary to determine whether the deed took effect on delivery or immediately before the death of the grantor, because it did not appear that the grantor had made or received any conveyances between the time of the delivery of the deed and the grantor's death. It also became unnecessary, said the justice, to determine whether the description "all the real estate, wherever situated, that I now own," was sufficient to pass the title to the land owned by the grantor when the deed was executed, "inasmuch as this description is aided by being coupled with 'a list of the several pieces or lots of land,' found among the grantor's papers, and referred to in the deed. These clauses together clearly show that the grantor had a legal and intelligible intention to convey, and the grantees to receive, by the deed, title to 'the several pieces or lots' described in the memoranda thus referred to. It follows, from the principles before stated, that, though the deed was intended to take effect *in futuro*, it operated to convey the grantor's title to such parts of 'the several pieces or lots of land,' referred to in the deed, as he continued to own when the deed took effect." As to the effect of the deed as a conveyance of title to real estate acquired by the grantor after the deed was executed, and



remaining in him when the deed took effect, the justice continued: "The language of the description in the deed is, 'all the real estate, wherever situated, that I now own or may own at the time of my decease.' The latter clause in the description is not aided by the subsequent reference in the deed to 'the several pieces or lots of land,' as that relates to real estate owned by him when the deed was executed. Real estate acquired by the grantor subsequently to the execution of the deed, was not *in esse* with respect to him when he signed the deed. Neither he nor his grantors could then have had any rational or intelligible intention with regard to the location, quantity, number of parcels, value, and the like, of the real estate he might thus acquire. He might take conveyances of property that would increase the value of the estate he owned when the deed was executed an hundred fold, and might dispose of it all before, or retain the whole or a part of it when the deed should take effect. Upon all these matters the deed is silent, though it is to the description in the deed that we are to look, in order to ascertain what particular real estate was designed to be conveyed by this clause in the deed. The subject of the grant under this clause cannot be ascertained from the description, and the grant is necessarily void for uncertainty. Moreover, the deed cannot be held to pass the grantor's title to real estate acquired by him subsequently to its execution, without abolishing the distinction between the formalities required by the statute of wills, and those necessary to convey real estate by deed."<sup>1</sup> To the general rule that an after-acquired title passes to the grantee is the exception that, if the grantor executes to his grantor a mortgage to secure the purchase money on the premises subsequently acquired, the rights of the mortgagee are not affected by the prior conveyance.<sup>2</sup>

<sup>1</sup> In *Libby v. Thornton*, 64 Me. 479.

<sup>2</sup> *Morgan v. Graham*, 35 Iowa, 213. It was said by Deady, J., in *Lamb v. Kamm*, 1 Saw. 238, 241: "But a mere expectation or belief that a party will at some future time acquire an interest in certain property, is not itself an estate or interest of any kind, and cannot be conveyed by

§ 857. **Conveyance in fee with condition upon a right of possession in the grantors.**—Where the parties clearly express their intention, there can be little, if any room, for construction. In a case in Vermont, where a deed in the usual form of a conveyance of a present fee simple, but with conditions, came before the court for construction, Mr. Justice Veazey commenced with the observation, so often well founded: “The unskillfulness and ignorance of the draftsman in such matters have as usual caused difficulty.” The deed made by a man and his wife to two of his children, in its granting part purported to convey a present estate in fee simple, but contained the condition that the grantees “are not to have any right or title whatever to the above-described premises, so long as we, or either of us, live; and the above deed is not to be binding upon us, or either of us, if in any case we should want or need to sell a part or all of said real estate in order to maintain us, and the above deed is to be null and void in such case, and we are to have the entire control of the above premises during our natural lives.” The construction placed upon this condition is best given in the language of the court: “If the part of the condition to the effect that the grantees are not to have any right or title whatever, so long as either of the grantors live, constituted the whole of the condition, it would be difficult to construe it as compatible with an estate whatever *in presenti*. Its import seems to be not to limit, explain, or qualify the grant, but in express terms to nullify and destroy it. Where the two parts of a deed are irreconcilable, one of them must fail; and of the two the condition should fail and the absolute part of the conveyance stand. . . . But a deed should be interpreted most favorably for its own validity, and for the effectuation of the design of the grantors, where that is plainly expressed, or can be collected, or ascertained from

deed. For instance, a son who is heir apparent to his father, may reasonably expect to inherit the latter's property, but an expectation or hope not being an interest in the property, it is well settled that the deed of the heir under such circumstances conveys nothing and is inoperative.”

the deed, unless it is in conflict with some rule of law. The intent is to be derived upon view and comparison of the whole instrument. We think the grantors' intent in this deed, though clumsily expressed, yet fairly collectible, and ascertainable from it as a whole, was to convey the premises in fee, conditioned upon a right of possession and use in the grantors, and the survivor of them during life, and of being supported, so far as needed, in addition and suitable to their condition in life, by the grantees; with the further right in the grantors to sell and convey for their necessities, in case of failure to receive support from the grantees. The right to support and to sell for their necessities, was a provision in the nature of a condition of absolute defeasance. If the grantees wished the conveyance to become absolute, they were bound to see that no occasion should arise for the grantors to sell for their necessities."<sup>1</sup> Where a father executes to his son a deed of real and personal property, with the condition that the grantor and his wife shall enjoy the use and possession of the property during their lives, and that at their death, and not before, the grantee shall have possession, the deed is to be considered as a grant upon condition subsequent.<sup>2</sup> In an earlier case, however, in Vermont, where a deed reserved an estate during the lives of the grantor and his wife, the latter not being a party to the deed, it was decided, that upon the death of the husband the estate descends to his personal representatives, and the wife is entitled to dower.<sup>3</sup> "The granting of an estate in fee, to take effect after a particular estate reserved as an estate for life, or lives, is not inconsistent with the law of England. And if it were, it

<sup>1</sup> Blanchard v. Morey, 56 Vt. 170, and cases cited.

<sup>2</sup> Sherman, Administrator v. Estate of Dodge, 28 Vt. 28.

<sup>3</sup> Gorham v. Daniels, 23 Vt. 600. Where a husband has conveyed land to a trustee for the use of his wife and her children by him, born and to be born, with a condition in the *habendum* that in case of him surviving her, the property should revert to him free from the trust, the title is in the trustee defeasible on the contingency, on the happening of which the title reverts in the husband: Woods v. Woods, 87 Ga. 562.

could have no application here; for under our statute of conveyancing, there being no livery of seisin in fact necessary to invest the grantee with the title, but only the seisin resulting from the due execution and recording of the deed, there is no objection whatever to the creating of a freehold estate, in terms, to take effect in future. This has been expressly decided in some of our American States, and we see no valid objection to holding the same under our statute.”<sup>1</sup> As illustrating the impossibility of formulating any but the most general rules of construction, is the observation of Mr. Justice Redfield, that “it is not uncommon for instruments quite as similar as these to receive different interpretations by the same court.”<sup>2</sup>

§ 858. **Limited estates.** — Whether a life estate or an estate in fee is conveyed must be determined by considering the deed as a whole. Some instances, where deeds came before the court for construction as to the estate conveyed, may be cited. In one, a father conveyed to his daughter, who was a married woman, a piece of property in consideration of natural love and affection, “and for settling and assuring the premises for such purposes, and upon such conditions as are hereinafter expressed”; the *habendum* clause was to have and to hold the property “unto the said grantee, her heirs and assigns, forever, to the end and intent that the same shall and may be for her sole and separate use, benefit, behoof, and disposal, notwithstanding her present or future coverture, for and clear of and from interruption, intervention, and control of her husband, or any future husband she may have, and without being in any way or manner subject, responsible, or liable to or for the existing or future contracts, debts, liabilities, or engagements of her present husband, or any future husband she may have.” The court decided that under this instrument the grantee took an es-

<sup>1</sup> Gorham v. Daniels, 23 Vt. 600, 611, per Redfield, J.

<sup>2</sup> Sherman Administrator v. Estate of Dodge, 28 Vt. 26, 30.

tate of inheritance in fee, and not an estate for life merely.<sup>1</sup> In another case a person in consideration of marriage executed a deed by which he conveyed a tract of land to the grantee, "and to her heirs and assigns; to hold the same during her lifetime, and then said land to revert to my heirs, both of her and my former wife; provided that she shall have all she makes as her own each year, to dispose of as she sees fit, and to hold said land in any manner belonging as aforesaid." The court held that by a fair and liberal interpretation of the whole deed it was the intention of the grantor to convey only a life estate, and not a fee simple.<sup>2</sup> A deed was made to a person upon condition that he should take "the possession, care, and custody of the said premises, for and during the term of his natural life, to let or lease the same, collect all rents and incomes to be derived therefrom, and to pay all taxes, insurance, repairs, and incidental expenses that may accrue on said premises, and the balance appropriate to his own use if he choose so to do, or to such uses and purposes in the exercise of his judgment as he may see fit, but said income not in any ways liable for his debts or liabilities, or be accountable to any person therefor; and at any time he may desire or deem expedient, relinquish the possession of the said premises" to the children of the grantee. The court decided that if he accepted the conveyance, he acquired a life estate which might be taken on execution by his creditors.<sup>3</sup> Real estate was conveyed to a husband "and his heirs and assigns forever." The deed further provided that the property was to be held by the grantee "for and during his natural life," and to his wife "if she be living at the death" of the grantee, and if she was not living at the death of the grantee, then to his heirs and assigns forever. The husband devised the land to his wife and to his children by her. Subsequently he died,

<sup>1</sup> Pool v. Blakie, 53 Ill. 495.

<sup>2</sup> Caldwell v. Hammons, 40 Ga. 345.

<sup>3</sup> Wellington v. Janvrin, 60 N. H. 174.

and his death was followed by that of his wife. The children of the marriage between the grantee and his wife instituted an action against the children of the wife by another marriage, claiming the whole of the land. The court, determined, however, that the husband acquired an estate which terminated on his death, leaving his wife surviving him; that at his death she became entitled to the whole estate, and that on her death, intestate, the children by both marriages became entitled to the land. The court were also further of the opinion, that if the husband had survived the wife, the title to the whole estate would have vested in him.<sup>1</sup>

§ 859. **Same subject—Continued.**—A deed was made to a husband in trust for the sole and separate use of his wife, “for and during the term of her natural life, free from the debts, liabilities, or contracts of her present or any future husband, with remainder at her death to her children then in life,” by her husband begotten. The deed also provided that if she should die leaving no child or issue of a child by her husband, the trustee, begotten, the remainder should be to him and his heirs in fee simple; it also contained a proviso that the trustee for the time being might at any time in a deed in which she would voluntarily join, convey, mortgage, or exchange the property, re-investing the proceeds of such sale subject to the same trust. The wife, the court held, had only a life estate in the property.<sup>2</sup> The legal effect of a deed conveying lands to a person,

<sup>1</sup> *Carson v. McCaslin*, 60 Ind. 334.

<sup>2</sup> In *Matter of Chisolm*, 8 Ben. C. C. 242. See, also, as to construction of peculiar deeds, and as to estate conveyed, *Seaman v. Harvey*, 16 Hun, 71; *Johnson v. Leonard*, 68 Me. 237; *Gilkey v. Shephard*, 51 Vt. 546; *Winter v. Gorsuch*, 51 Md. 180; *Thompson v. Carl*, 51 Vt. 408; *Preston v. Heiskell*, 32 Gratt. 48; *Vinson v. Vinson*, 4 Ill. App. 138; *Daniels v. Citizens' Savings Institution*, 127 Mass. 534; *Clayton v. Henry*, 32 Gratt. 565; *Phinzy v. Clark*, 62 Ga. 623; *Cribb v. Rogers*, 12 S. C. 564; 32 Am. Rep. 511; *Hemstreet v. Burdick*, 90 Ill. 444; *Braswell v. Suber*, 61 Ga. 398; *Tremmel v. Kleiboldt*, 6 Mo. App. 549; *Taylor v. Cleary*, 29 Gratt. 448; *Wayne v. Lawrence*, 53 Ga. 15; *Mowry v. Bradley*, 11 R. I. 370; *Waugh v. Waugh*, 84 Pa. St. 350; 24 Am. Rep. 191; *Long v. Swindell*, 77 N. C. 176; *Jackson v. Hodges*, 2 Tenn. Ch. 276;

to use the grantor's language, "at my death," is that the grantor has reserved a life estate to himself, and covenanted to stand seised to the use of the grantee at the grantor's death.<sup>1</sup> A deed conveyed land to a woman during her natural life, and after her death to her children by her then husband, "during the natural life of each of said children, and after their death" to her husband in fee, and "to his heirs and assigns forever." The tenure in the *habendum* clause was to the mother "during her natural life, and after her death to the said surviving children," and after the death of each of the children to

Hurd v. French, 2 Tenn. Ch. 350; Reaves v. Ore Knob Copper Co., 76 N. C. 593; Waugh v. Miller, 75 N. C. 127; Allen v. Bowen, 73 N. C. 155; McEachern v. Gilchrist, 75 N. C. 196; Hawkins v. Parham, 75 N. C. 259; Indiana Central Canal Co. v. State, 53 Ind. 575; Forest v. Jackson, 56 N. H. 357; Holt v. Somerville, 121 Mass. 574; Heermans v. Robertson, 64 N. Y. 332; Pierce v. Gardner, 83 Pa. St. 211; Phillips v. Thompson, 73 N. C. 543; Hutchinson v. Chicago etc. R. R. Co., 37 Wis. 582; Hurst v. Hurst, 7 W. Va. 289; Ochiltree v. McClung, 7 W. Va. 232; Taggart v. Risley, 4 Or. 235; Tesson v. Newman, 62 Mo. 198; Goodel v. Hibbard, 32 Mich. 47; Pittman v. Corniff, 52 Ala. 83; Lawe v. Hyde, 39 Wis. 345; Lerner v. Saltonstail, 114 Mass. 407; Ingalls v. Newhall, 139 Mass. 268; Hastings v. Merriam, 117 Mass. 245; Broadstone v. Brown, 24 Ohio St. 430; Board of Education v. Trustees of First Baptist Church, 63 Ill. 204; Sheridan v. House, 4 Abb. N. Y. App. 218; Marvin v. Brewster Iron Mining Co., 55 N. Y. 538; 14 Am. Rep. 322; Chase v. Dix, 46 Vt. 642; Monroe v. Bowen, 26 Mich. 523; Hawkins v. Chapman, 36 Md. 83; Dubois v. Campau, 24 Mich. 360; Attwood v. Kittell, 9 Ben. C. C. 473; Powell v. Morrissey, 84 N. C. 421; Watson v. Priest, 9 Mo. App. 263; Robinson v. Payne, 58 Miss. 690; Hewitt's Appeal, 55 Md. 509; Peoria v. Darst, 101 Ill. 609; Doe v. Pickett, 65 Ala. 487; Holmes v. Holmes, 86 N. C. 205; Smith v. Rice, 130 Mass. 441; Bratton v. Massey, 15 S. C. 277; Cannon v. Barry, 59 Miss. 289; Green Bay & Mississippi Canal Co. v. Hewett, 55 Wis. 96; 42 Am. Rep. 701; Currier v. Janvrin, 58 N. H. 374; Franks v. Berkner, 67 Ga. 264; Mackall v. Richards, 1 Mackey (D. O.), 444; Mendenhall v. Mower, 16 S. C. 303; Brown v. Brown, 68 Ala. 114; Burnett v. Burnett, 17 S. C. 545; Commonwealth v. Hackett, 102 Pa. St. 505; Hanks v. Folsom, 11 Lea (Tenn.), 555; Lindley v. Crombie, 31 Minn. 232; Edwards v. McClurg, 39 Ohio St. 41; Kemp v. Bradford, 61 Md. 330; O'Brien v. Brice, 21 W. Va. 704; Grubb v. Grubb, 101 Pa. St. 11; Fletcher v. Fletcher, 88 Ind. 418; Lorick v. McCreery, 20 S. C. 424; Louisville & Nashville R. R. Co. v. Boykin, 76 Ala. 560; Monmouth v. Plimpton, 77 Me. 556; Zittle v. Weller, 63 Md. 190; Wilder v. Wheeler, 60 N. H. 351; Oreswell v. Grumbling, 107 Pa. St. 408.

<sup>1</sup> Vinson v. Vinson, 4 Bradw. (Ill. App.) 138.



the husband "in fee, and to his heirs and assigns forever." The court construed the deed as giving the children an interest contingent upon their surviving their mother; only such of the children as survive her could take the estate, and the interest of the husband was held to be a vested remainder in fee, subject to the intervening contingent estate of the children.<sup>1</sup> Where a deed contains the condition that a person not named as grantee "is to have the privilege of a support off of said lands during his lifetime, without encumbrance," such person has a life estate. The words "without encumbrance" mean without impediment to the rights of the life tenant.<sup>2</sup> "He could not have his support off the land without the use and occupation of it. The right to such support from the land involves the use and occupation, as without the use and occupation he could not derive his support from it. And it seems to us that a life estate was as effectually conveyed to him as if the deed had provided that he should have the use and occupation, or the rents and profits of the land for life."<sup>3</sup> The obligation to support, when a condition in a deed, is generally regarded as a personal duty, which cannot be transferred to another.<sup>4</sup>

<sup>1</sup> *Smith v. Block*, 29 Ohio St. 488.

<sup>2</sup> *Stout v. Dunning*, 72 Ind. 343.

<sup>3</sup> *Stout v. Dunning*, 72 Ind. 343, 346, on petition for rehearing by Worden, J.

<sup>4</sup> *Eastman v. Batchelder*, 36 N. H. 141; 72 Am. Dec. 295; *Flanders v. Lamphear*, 9 N. H. 201. For cases in which instruments conveying a limited or unqualified estate, on the condition that the grantee shall support the grantor, have come before the courts, see *Bryant v. Erskine*, 55 Me. 153; *Jenkins v. Stetson*, 9 Allen, 128; *Marsh v. Austin*, 1 Allen, 235; *Hawkins v. Clermont*, 15 Mich. 511; *Hubbard v. Hubbard*, 12 Allen, 586; *Bethlehem v. Annis*, 40 N. H. 34; 77 Am. Dec. 700; *Hoyt v. Bradley*, 27 Me. 242; *Rhoades v. Parker*, 10 N. H. 83; *Brown v. Leach*, 35 Me. 41; *Austin v. Austin*, 9 Vt. 420; *Soper v. Guernsey*, 71 Pa. St. 219; *Dearborn v. Dearborn*, 9 N. H. 117; *Henry v. Tupper*, 29 Vt. 358; *Wilder v. Whittemore*, 15 Mass. 263; *Pettee v. Case*, 2 Allen, 546; *Thayer v. Richards*, 19 Pick. 398; *Fiske v. Fiske*, 20 Pick. 499; *Gibson v. Taylor*, 6 Gray, 310; *Dunklee v. Adams*, 20 Vt. 415; 50 Am. Dec. 44; *Hill v. More*, 40 Me. 515; *Gilson v. Gilson*, 2 Allen, 115; *Daniels v. Eisenlord*, 10 Mich. 454; *Tucker v. Tucker*, 24 Mich. 426; 35 Mich. 365; *Lanfair v. Lanfair*, 18 Pick. 299; *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301.

§ 860. **Conveyance to wife and children.**—A conveyance to a woman and her children makes them joint tenants or tenants in common.<sup>1</sup> Thus, where a deed is made to a woman and her children “to have and to hold said tract of land to the parties of the second part, their heirs and assigns forever,” the mother and children take an undivided estate in fee simple.<sup>2</sup> “If others were named in such a grant than the children,” said the court, “there then would be no room for a contention, and because the word ‘children’ is used, affords no reason for inferring an intention on the part of the grantor to make a different disposition of the estate than the plain language of the instrument indicated, and then to reverse the rule when applied to strangers for the reason that such a conveyance is susceptible of but one construction. Nor is there any reason to suppose that the draftsman would employ such language in a conveyance when the grantor’s purpose is to give or grant the estate to the daughter for life, and the remainder to her children. No one competent to reduce to writing the substance of an ordinary business transaction between parties would overlook the wishes of the grantor in using the language found in this deed, if his purpose was to create a life estate in the daughter, with a remainder to her children. The object of construing instruments of writing like this, whether in a grant or devise, is to ascertain the intention of the party making, and while the words ‘for life’ may not be used in the conveyance, there may be other words or expressions, or such relation between the parties as would indicate a plain intent to limit

<sup>1</sup> *Brenham v. Davidson*, 51 Cal. 352; *Jackson v. Coggins*, 29 Ga. 403; *Estate of Utz*, 43 Cal. 200; *Powell v. Powell*, 5 Bush, 619; 96 Am. Dec. 372; *Mason v. Clarke*, 17 Beav. 126; *Bustard v. Saunders*, 7 Beav. 92; *Eagles v. Le Breton*, Law R. 15 Eq. 148; *Newell v. Newell*, Law R. 7 Ch. 253; *Hoyle v. Jones*, 35 Ga. 40; 89 Am. Dec. 273; *Webb v. Byng*, 2 Kay & J. 669; *De Witte v. De Witte*, 11 Sim. 41; *Crockett v. Crockett*, 2 Phill. Ch. 553; *Morgan v. Britten*, Law R. 13 Eq. 28; *Freeman on Co-tenancy and Partition*, § 26. See *McCall v. McCall*, 1 Tenn. Ch. 504; *Doty v. Wray*, 66 Ga. 153.

<sup>2</sup> *Bullock v. Caldwell*, 81 Ky. 566.

the interest conveyed, or to grant to one in the same instrument a less estate than to another." The court said, however, that in the case before it, the conveyance was to the woman and her children, "with the terminous clause 'to them and their heirs forever'; so there is nothing on the face of the deed to indicate a purpose to convey any other than a joint estate to the parties of the second part."<sup>1</sup> But in a former case in Kentucky, while the rule was recognized that a father making provision for his child and that child's children, may be supposed to have intended them to take a joint estate, yet, where he makes provision for his wife and children, it should be presumed he intended to give the whole to the wife for life, and the remainder to the children, unless the terms of the provision, or the circumstances attending it, showed a contrary intention.<sup>2</sup> The reason that led the court to draw the distinction was, that when a deed was made to a man's child and that child's children, "they are all of his blood, and the natural objects of his bounty; but when a husband makes a conveyance to his wife and *their* children, there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by her death, pass into the hands of a stranger, even as against himself." The court continued, that no doubt the grantor "desired and intended that his wife should enjoy the property equally with their children, but it would be unnatural to suppose that he intended to invest her with an estate which might pass from her to strangers to his blood. This case serves to illustrate the utter unreasonableness of applying to every deed or will the same rule of construction with a view to ascertain the intention of the grantor."<sup>3</sup> A conveyance to a woman "and all the children she now has or ever will have," was construed in Missouri as vesting a life estate in the mother, with remainder to the children.<sup>4</sup> In

<sup>1</sup> In *Bullock v. Caldwell*, 81 Ky. 566.

<sup>2</sup> *Davis v. Hardin*, 80 Ky. 672.

<sup>3</sup> *Davis v. Hardin*, 80 Ky. 672.

<sup>4</sup> *Kinney v. Mathews*, 69 Mo. 520. But in this case, Henry, J., dis-

Georgia, where a deed conveyed property for the use of a woman and "the children she now has, and those she may hereafter have by her present husband, free from the control or disposition of her present husband," the *habendum* clause stating that the conveyance was to her and her assigns, the court held that she took a joint interest with her children.<sup>1</sup> Where a deed is made by a person in trust for his married daughter "and the heirs of her body, for their support and the support of her children, and at the lawful age of her youngest child, after her death, then the property to be equally divided among her children," the deed creates, in Alabama, a life estate in the daughter with remainder to her children as purchasers.<sup>2</sup>

sented, being of the opinion that all of the estate of the grantor passed out of him and vested in the mother and her children then living.

<sup>1</sup> Lee v. Tucker, 56 Ga. 9.

<sup>2</sup> May v. Ritchie, 65 Ala. 602. "The whole structure of the deed," said Mr. Chief Justice Brickell, "clearly indicates that it was drawn by one not skilled in drawing such instruments, unacquainted with their forms, and unacquainted with the meaning—the technical meaning and force—of the expressions employed. The indiscriminate use of the words 'heirs of the body,' and of the word 'children,' to designate the same class of persons, is a marked manifestation of unskillfulness, and the want of knowledge of the difference in the legal meaning of the terms. The words 'heirs of the body,' unexplained, unrestricted, certainly created an estate tail at common law. They were the appropriate words for the creation of that estate, limited to lineal descendants generally, as was the general term 'heirs,' to the creation of a fee simple, a pure inheritance, clear of qualification or condition, to which whoever was the heir of the first taker at the time of his death, whether lineal or collateral, would succeed. But whenever it was apparent on the face of the instrument creating an estate that either of these terms, 'heirs,' or 'heirs of the body,' was employed, not as words of limitation, but as words of purchase, as words designating a particular class, who were to take, not from or through an ancestor, but from the grantor or deviser, they did not create either a fee simple or a fee tail. The grantor gives the daughter an estate for life only in express terms. It was not intended that she should have or take any greater estate or interest. But under the operation of the rule in Shelley's case, of force when the deed was executed, a gift to one for life, and then to the 'heirs of his body,' would create an estate tail; the words 'heirs of the body' being, in their natural and ordinary signification, words of limitation and not of purchase. The word 'children,' however, is as essentially a word of purchase, and never construed as a word of limitation, unless absolutely necessary to

§ 861. **Relation from re-execution of lost deed.**—Where a deed once executed has been lost and the grantor executes a second deed, it may, in some instances, become necessary, when the rights of intervening creditors are involved, to determine whether the second deed takes effect from the date of its execution, or whether it relates back to the time of the first deed. Such a case arose in North Carolina. A father executed deeds of gift to A and B, his two sons. The deed made to A was lost before it was registered. Subsequently B conveyed his land to A, and the father executed a deed to B for the land which had originally been conveyed to A in substitution for the deed which had been lost. In this second deed he provided that he was to retain “possession of the above described lands and premises during his natural life, or so long as he may desire it for his own use and benefit.” The court decided that if the original deeds to A and B were valid as to creditors when they were executed, no subsequent exchange between them affected the rights of creditors; and although the last deed contained a reservation of a life estate, that it related back to the date of the lost deed.<sup>1</sup> The reasoning of the court was that if the grantee in the last deed could set up the lost deed in a

give effect to the clear intention of the grantor or deviser: *Dunn v. Davis*, 12 Ala. 135; *Scott v. Nelson*, 3 Port. 452; 29 Am. Dec. 266. And whenever the word ‘children,’ and ‘heirs of the body,’ are indiscriminately used to designate remaindermen, they have been regarded as words of purchase, designating a class of persons who were to take on the expiration of the particular estate, not from the tenant of that estate, but from the donor, a different intention not being clearly indicated: *Dunn v. Davis*, 12 Ala. 135; *Shepherd v. Nabors*, 6 Ala. 631; *Twelves v. Nevill*, 39 Ala. 175; *Robertson v. Johnson*, 30 Ala. 197; *Williamson v. McConico*, 36 Ala. 22. If the estate for life, expressly given to the daughter, were enlarged into an estate tail, converted by the statute into a fee simple, it is apparent the intention of the donor, which ought to prevail, so far as it is not offensive to law, would be disappointed and defeated. The gift over to the children, the division of the property among them, after the death of the mother, when the youngest became of age, would fail. We cannot doubt that the words ‘heirs of the body’ were used as the synonym of ‘children’; and being so used, the first taker had but a life estate, with remainder to her children.”

<sup>1</sup> *Hodges v. Spicer*, 79 N. O. 223.

court of equity, and compel the grantor to execute another deed, the grantor might voluntarily do what in equity he could be forced to do.

§ 862. **Water power.**—A peculiar case, involving the rights of different parties to determinable portions of water used for propelling machinery, may be selected as illustrating the observation that each case must, in a great measure, be decided by itself. In the case referred to, the owner of property on which were two mills, propelled by power obtained from the water of a contiguous river, sold a portion of the property on which was situated one of the mills. The deed, after describing the property, granted the right to use water by this clause: "Together with the right to use water to the amount of the issue of the wheel now in said sawmill, supposed to be six hundred inches, more or less, of water, being hereby intended to grant or convey so much of the water of the Wapsipinicon river as above mentioned." The construction put upon this deed was that the amount of water to which the grantee was entitled was to be measured by the capacity of the wheel in the mill at the time of the conveyance; that the quantity of water mentioned in the deed was used by way of description, and not of limitation; and that the grantee might put in operation as many wheels as he desired, so long as he did not use in the aggregate more water than the issue of one wheel originally in the mill.<sup>1</sup> An easement in the millpond is

<sup>1</sup> *Doan v. Metcalf*, 46 Iowa, 120. The opinion of the court was delivered by Mr. Justice Beck. As the case is a peculiar one, we quote his language so far as it relates to the construction of the deed: "It is obvious that it was intended to convey sufficient water to propel the wheel described, when used in driving the machinery which it had the capacity to run. The dimension and structure of the wheel were such that, with a sufficient supply of water, it had capacity to propel a known quantity of machinery, or, rather, a quantity that may be determined under the laws of dynamics. It was not the intention of the parties that the wheel should be run without machinery attached thereto, nor that it should be run with less machinery than it had capacity to propel, when used to the extent of the right conveyed by the deed. The defendants, then, took by the grant the right to a stream of water sufficient to propel

embraced in the grant of a "dam."<sup>1</sup> If the grantee is entitled to the privilege of drawing water from other por-

the quantity of machinery which could, in its proper operation, be moved by the wheel in use at the date of the deed. The wheel thus becomes the instrument for measuring the quantity of water to which defendants are entitled. It is very plain that this quantity is not to be limited to six hundred inches, for the very language of the instrument exhibits uncertainty in the minds of the contracting parties as to that number, which was used simply in description of the wheel which was to be the measure of the water granted. If this description be incorrect or fail, the thing meant, the wheel, if it can be identified, will control as to its capacity, rather than words clearly used with the understanding and admission on the part of both parties, of their uncertainty. We are not required here to determine upon the methods and formulas of machinists, whereby they measure water power by superficial inches, or to make any inquiry upon that subject. Such methods and formulas, it appears by the evidence, are used. It is quite apparent that a water wheel of given dimension, propelling its proper quantity of machinery, will use a determinable quantity of water, all necessary conditions, as the height of the head of water, etc., being known. This water issues from the wheel, and is, therefore, aptly called in the deed 'the issue of the wheel.' A great deal of learning and experience were exhibited by the witnesses at the trial, upon the subject of the methods and formulas to be adopted in determining the quantity of water used by wheels of different constructions. We may be permitted to say that some of the methods explained in the testimony were rather arbitrary than based upon scientific principles. This remark, we think, will be justified, when we call attention to the fact that by some of them the quantity is indicated by superficial inches, without taking note of time or the velocity of the water. But we are satisfied, and this conclusion is drawn from the evidence in this case, that the issue of water from a wheel may be determined, proximately at least, with sufficient accuracy for practical purposes. Experience and mechanical skill, aided by the laws of hydraulics, may reach such result. We are not required, in view of the disposition we shall make of the case, to determine now the manner or methods to be adopted in ascertaining the issue of the wheel which is made the measure of the quantity of water granted to defendants. Those charged with the duty of setting apart, or otherwise prescribing the quantity of water to which the defendants are entitled, will do this. We make one suggestion that readily occurs to the mind in considering the provisions of the grant. The defendants, as we have said, are entitled to a sufficient supply of water to run the wheel with the proper quantity of machinery attached thereto. This quantity may vary with the head of water in the flume or dam, and, consequently, with the variation of water in the stream. If this be so, due account must be made of the fact, so that defendants, at all times, when, under the contract,

<sup>1</sup> *Maddox v. Goddard*, 15 Me. 218; 33 Am. Dec. 604; *Hutchinson v. Chicago Ry. Co.*, 37 Wis. 582; *Sabine v. Johnson*, 35 Wis. 185.



tions of the grantor's land, which were then in use, as appurtenant to the land, and if water is conveyed in an aqueduct from a spring upon another part of the grantor's land to the land embraced in the deed, and there used at the time at which the deed was executed, the grantor cannot divert the water, although he does so upon a part of his land not conveyed by the deed; such a diversion would be a disturbance of the grantee's right, for which he can bring an action.<sup>1</sup> It is no defense in such a case that the grantee did not desire to use the water, or that by the diversion he has suffered no actual damage.<sup>2</sup>

**§ 863. Appurtenances and incidents.**—The grant of “a well” includes the land occupied by it.<sup>3</sup> The grant of a

they are entitled to the full quantity of water, may use the amount necessary to propel the machinery. If, therefore, the water for defendants' mill be set apart by gates or bulkheads in the flume, due arrangements must be provided to meet this condition. But, in our judgment, the just and more simple manner of partitioning the water is by means of the water wheels used by defendants. Let the quantity of water issued by the old wheel be determined; the water issued by the wheels in use by defendants must be no more, and the wheels to be used by defendants must require no more water than did the old wheel. Defendants may desire to use machinery which would require the construction of other water wheels than those he is now using. There can be no objection to his doing so, but he can use at no time a greater quantity of water than indicated. Therefore, he will not be permitted to run wheels at the same time which actually use a greater quantity. Wheels may be idle when not used as directed by those rules.”

<sup>1</sup> Vermont Central R. R. Co. v. Estate of Hills, 23 Vt. 681.

<sup>2</sup> Vermont Central R. R. Co. v. Estate of Hills, 23 Vt. 681. For other cases involving water rights, see Barber v. Nye, 65 N. Y. 211; Canal Co. v. Hill, 15 Wall. 94; Taylor v. St. Helens, 6 Chip. D. 264; Robinson v. Imperial Silver Min. Co., 5 Nev. 44; Kilgore v. Hascall, 21 Mich. 502; De Witt v. Harvey, 4 Gray, 486; Schuylkill Navigation Co. v. Moore, 2 Whart. 477; Mayor v. Commissioners, 7 Pa. St. 348; Society v. Holsman, 1 Halst. Ch. 126; Williams v. Baker, 41 Md. 523; Ashby v. Eastern R. R. Co., 5 Met. 368; 38 Am. Dec. 426; Johnson v. Rayner, 6 Gray, 107; Pratt v. Lamson, 2 Allen, 275; Bardwell v. Ames, 22 Pick. 333; Woodcock v. Estey, 43 Vt. 515; Jamaica Pond Aqueduct v. Chandler, 9 Allen, 159; Owen v. Field, 102 Mass. 90; Jackson v. Halstead, 5 Cowen, 216; Mixer v. Reed, 25 Vt. 254; Sheets v. Selden, 2 Wall. 177; Wiswall v. Hall, 3 Paige, 313. See, also, Egremont v. Williams, 11 Q. B. 707; Buszard v. Capel, 8 Barn. & C. 141; Smith v. New York, 68 N. Y. 552; Goodrich v. Eastern R. R. Co., 37 N. H. 149.

<sup>3</sup> Mixer v. Reed, 25 Vt. 254. See in the case of a grant of a “pool”

tract of land passes everything standing or growing upon the land.<sup>1</sup> Other land cannot be considered as appurtenant to the land granted.<sup>2</sup> The grant of a sawmill with appurtenances passes the machinery in the mill.<sup>3</sup> In brief, a deed in general terms passes everything which is a constituent part of the thing granted.<sup>4</sup> A water right will pass as appurtenant to the land.<sup>5</sup> A right of way passes when the land conveyed is surrounded by other lands of the grantor.<sup>6</sup> But in order that the grantee may have this right of way, the way must be one of necessity and not of convenience.<sup>7</sup> A grant of a house

or a "pit," *Whitney v. Olney*, 3 Mason, 282; *Johnson v. Rayner*, 6 Gray, 107; *Wooley v. Groton*, 2 Cush. 305.

<sup>1</sup> *Cook v. Whiting*, 16 Ill. 481; *Brackett v. Goddard*, 54 Me. 313; *Goodrich v. Jones*, 2 Hill, 142. See, also, *Mott v. Palmer*, 1 N. Y. 364; *Terhune v. Elbersen*, 2 N. J. L. 725; *McIlvane v. Harris*, 20 Mo. 457; 64 Am. Dec. 196; *Foote v. Colvin*, 3 Johns. 216; 3 Am. Dec. 478; *Chapman v. Long*, 10 Ind. 465; *Kittredge v. Woods*, 3 N. H. 503; 14 Am. Dec. 393.

<sup>2</sup> *Jackson d. Yates v. Hathaway*, 15 Johns. 447; 8 Am. Dec. 263; *Leonard v. White*, 7 Mass. 6; 5 Am. Dec. 19; *Riddle v. Littlefield*, 53 N. H. 503; 16 Am. Rep. 388; *Harris v. Elliott*, 10 Peters, 25; *Blaine v. Chambers*, 1 Serg. & R. 169; *Ammidown v. Granite Bank*, 8 Allen, 293; *Tyler v. Hammond*, 11 Pick. 193.

<sup>3</sup> *Farrar v. Stackpole*, 6 Me. 154; 19 Am. Dec. 201. See *Sparks v. Hess*, 15 Cal. 186.

<sup>4</sup> *Wilson v. Hunter*, 14 Wis. 684; 80 Am. Dec. 795; *Oave v. Crafts*, 53 Cal. 135; *Farrar v. Stackpole*, 6 Me. 154; 19 Am. Dec. 201. See *Elliott v. Carter*, 12 Pick. 436; *James v. Plant*, 5 Ad. & E. 479; *McDonald v. McElroy*, 60 Cal. 484; *Sparks v. Hess*, 15 Cal. 186.

<sup>5</sup> *Farmer v. Ukiah Water Co.*, 56 Cal. 11. Riparian rights are appurtenant to land: *Alta Land etc. Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217. Where the right to the use of a ditch and water exists in favor of land, is an essential part of the value of the land, and perhaps is the sole inducement to purchase, it passes by the deed whether the word "appurtenances" be used or not: *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727. A water right acquired and used for a beneficial purpose in connection with land is an appurtenance and is transferred by the deed unless reserved: *Sweetland v. Olson*, 11 Mont. 27; *Crooker v. Benton*, 93 Cal. 365.

<sup>6</sup> *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *Taylor v. Warnaky*, 55 Cal. 350. See *Regan v. Boston Gaslight Co.*, 137 Mass. 37; *Haven v. Seeley*, 59 Cal. 494; *Reed v. Spicer*, 27 Cal. 27. See as to dedication of road, *Deacons v. Doyle*, 75 Va. 258; *Patton v. Quarrier*, 18 W. Va. 447.

<sup>7</sup> *Nichols v. Luce*, 24 Pick. 102; 35 Am. Dec. 302; *Carey v. Rae*, 58 Cal. 160. If the way already exists, it will pass as an appurtenant ease-

includes the land under it.<sup>1</sup> A grant or reservation "of the whole of a ciderhouse and cidermill standing on land, so long as the said ciderhouse shall stand thereon, and no longer," passes a freehold in the land on which the building stands, even though it has ceased to be used as a ciderhouse.<sup>2</sup> "The general rule of law is, that when a house or store is conveyed by the owner thereof, everything then belonging to, and in use for the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession. But it is strictly a question, what passes by the grant. Thus, if a man sells a mill, which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of the grant, the owner of all the stream above and below the mill. And it will make no difference that the mill was once another person's, and that the adverse right to use the stream had been acquired by the former owner, and might have been afterward extinguished by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to the grant; and passes with the property all those easements and privileges which at the time belong to it, and are in use as appurtenances."<sup>3</sup> The grantee is entitled to unaccrued rent un-

ment: *Murphy v. Campbell*, 4 Pa. St. 484; *Pope v. O'Hara*, 48 N. Y. 455; *Harris v. Elliott*, 10 Peters, 25.

<sup>1</sup> *Allen v. Scott*, 21 Pick. 25; 32 Am. Dec. 238; *Bacon v. Bowdoin*, 22 Pick. 410; *Stockwell v. Hunter*, 11 Met. 455; 45 Am. Dec. 220. And see *Johnson v. Raynor*, 6 Gray, 110; *Crawfordsville v. Boots*, 76 Ind. 32. See *Endsley v. State*, 76 Ind. 467.

<sup>2</sup> *Esty v. Currier*, 98 Mass. 500. All parts of a deed should be considered so that every part may have effect: *Herrick v. Hopkins*, 23 Me. 217; *Thrall v. Newell*, 19 Vt. 202; 47 Am. Dec. 682; *Richardson v. Palmer*, 38 N. H. 212; *Foy v. Neal*, 2 Strob. 156; *Byrd v. Ludlow*, 77 Va. 483.

<sup>3</sup> In *United States v. Appleton*, 1 Sum. 492, 500.

der a lease existing at the date of the deed. If the grantor collects the rent becoming due after the execution of the deed, he is liable to the grantee in an action for money had and received.<sup>1</sup> All rent which has accumulated, and which has not become so disconnected with the land as to become personal property, will pass by the deed.<sup>2</sup> A deed of land conveys the buildings thereon. Evidence of the intention of the grantor is inadmissible.<sup>3</sup>

§ 864. **Construction of particular words.**—Manifestly, no general rule can be laid down as to the construction of particular words. The primary object courts have in view is to carry out the intention of the parties. But in this connection it may not be unprofitable to mention some instances in which certain words have been construed. The words “or” and “and” have sometimes been construed so as to give to one its opposite meaning.<sup>4</sup> The word “appurtenances” refers to things incidental to

<sup>1</sup> *Van Wagner v. Van Nostrand*, 19 Iowa, 422.

<sup>2</sup> *Winslow v. Rand*, 29 Me. 362. See § 307.

<sup>3</sup> *Isham v. Morgan*, 9 Conn. 374; 23 Am. Dec. 361.

<sup>4</sup> *Jackson v. Topping*, 1 Wend. 388; 19 Am. Dec. 515; *Price v. Hart*, Pol. 645; *White v. Crawford*, 10 Mass. 183. See, also, *Will d. Burrill v. Kemp*, 3 Term Rep. 470; *Brittain v. Mitchell*, 4 Ark. 92; *Chapman v. Dalton*, Plow. 289; *Parker v. Carson*, 64 N. C. 563. But see *Dumont v. United States*, 98 U. S. 143; *Thomas v. Perry*, Peters O. C. 56. These words are often interchanged in the construction of wills. See *Miles v. Dyer*, 5 Sim. 435; *China v. White*, 5 Rich. Eq. 426; *Kindig v. Deardorff*, 39 Ill. 300; *Welsh v. Elliott*, 7 Serg. & R. 279; *Johnson v. Simcox*, 31 Law J. Ex. 38; 6 Hurl. & N. 6; 7 Jur., N. S., 349; *Brewer v. Opie*, 1 Call, 212; *Den d. Dickenson v. Jordan*, 1 Murph. 380; *Parker v. Parker*, 5 Met. 134; *Tennell v. Ford*, 30 Ga. 707; *Holcomb v. Lake*, 24 N. J. L. 686; *Brooke v. Croxton*, 2 Gratt. 506; *Bostick v. Lawton*, 1 Spear, 258; *Thompson v. Teulon*, 22 L. J. Ch. 243; *Weddell v. Mundy*, 6 Ves. 341; *Richardson v. Spraag*, 1 P. Wms. 434; *Parkin v. Knight*, 15 Sim. 83; *Montagu v. Nucella*, 1 Russ. 165; *Harris v. Davis*, 1 Coll. 416; *Maynard v. Wright*, 26 Beav. 285; *Long v. Dennis*, 4 Burr. 2052; *Den d. Brown v. Mugway*, 15 N. J. L. 330; *Green v. Harvey*, 1 Hare, 428; *Greated v. Greated*, 26 Beav. 621; *Law v. Thorp*, 25 Law J. Ch. 75; 1 Jur., N. S., 1082; *Bently v. Meech*, 25 Beav. 197. So in the case of statutes, see *Commonwealth v. Griffin*, 105 Mass. 185; *O'Connell v. Gillespie*, 17 Ind. 459; *Hughes v. Smith*, 64 N. C. 434; *State v. Pool*, 74 N. C. 402; *Boag v. Lewis*, 1 Up. Can. Q. B. 357; *Streeter v. People*, 59 Ill. 595; *Boyles v. McMurphy*, 55 Ill. 236; *Townsend v. Read*, 10 Com. B., N. S., 308; *People*

the land conveyed. It does not include other land.<sup>1</sup> In the premises of a deed, the word "also" signifies "likewise; in like manner; in addition to; denotes that something is added to what precedes it."<sup>2</sup> The words "have granted" are equivalent in signification to the words "do hereby grant."<sup>3</sup> If the expression "from" or "to" an object is used, the terminus is not included.<sup>4</sup> Where a deed is made to a person, her heirs and assigns, with a *habendum* to her sole and separate use, free from the control or interference of any husband she may have, and to the use of "*heir* heirs and assigns forever," the word "heir" will be taken as a clerical mistake for "her."<sup>5</sup> The term "sedge flat" imports a tract of land below high-water mark.<sup>6</sup> If a grantor uses the words "reversion and remainder" in a grant of land for a public highway, he retains nothing which he can afterward convey, the grantee taking the reversionary right.<sup>7</sup> By a grant "of the use of the timber," an incorporeal right to use the timber only is conveyed. Title to the soil does not pass.<sup>8</sup> The word "adjacent" signifies "in the neighborhood of."<sup>9</sup> "All the property I possess," used in a conveyance, includes all the property owned by the grantor,

*v. Sweetser*, 1 Dakota, 308; *State v. Myers*, 10 Iowa, 448; *State v. Brandt*, 41 Iowa, 593; *Eisfield v. Kenworth*, 50 Iowa, 389; *Sparrow v. Davidson College*, 77 N. C. 35; *Porter v. State*, 58 Ala. 66; *Ferrell v. Lamar*, 1 Wis. 19.

<sup>1</sup> *Otis v. Smith*, 9 Pick. 293; *Helme v. Guy*, 2 Murph. 341. See *Hill v. West*, 4 Yeates, 142; *Harris v. Elliott*, 10 Peters, 25; *Worthington v. Gimson*, 2 El. & E. 618; *Plant v. James*, 2 Nev. & M. 517; 6 Nev. & M. 282; 4 Ad. & E. 749; 5 Barn. & Adol. 791; *Evans v. Angell*, 26 Beav. 205; *Barlow v. Rhodes*, 1 Crompt. & M. 205.

<sup>2</sup> *Panton v. Tefft*, 22 Ill. 366.

<sup>3</sup> *Pierson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440.

<sup>4</sup> *Bonney v. Morrill*, 52 Me. 252. By the expression "from a street," is not necessarily meant from its nearest line: *Pittsburg v. Oluley*, 74 Pa. St. 259.

<sup>5</sup> *Huntington v. Lyman*, 138 Mass. 205.

<sup>6</sup> *Church v. Meeker*, 34 Conn. 421.

<sup>7</sup> *Vaughn v. Stuzaker*, 16 Ind. 338.

<sup>8</sup> *Clark v. Way*, 11 Rich. 621.

<sup>9</sup> *Henderson v. Long, Cooke*, 128.

in remainder as well as in immediate occupation.<sup>1</sup> The word "convey," in a deed, will pass the title. It is equivalent to a grant.<sup>2</sup> By the use of the term "rope-walk," such land as is exclusively devoted to a rope-walk will pass.<sup>3</sup> Where land is conveyed "with all the buildings, ways, privileges, and appurtenances to the same belonging," any easement or appurtenances already existing and belonging to the land will pass.<sup>4</sup> But this is not appropriate language to create a new appurtenance or easement.<sup>5</sup> Title to property will pass by the use of the words "go to" in a conveyance.<sup>6</sup> The word "quit" is equivalent in legal effect to "sell" or "release."<sup>7</sup> The word "by," used descriptively, means "near" to the object to which it relates, and not "in immediate contact with," and "near" is a relative term.<sup>8</sup> The *termini* are not included when the word "between" is used.<sup>9</sup> A freehold may be conveyed by the use of the words "assign and make over."<sup>10</sup> If, by a deed, a trust is created for the benefit "of the present as well as the future heirs" of a person, the word "heirs" will be taken to mean "children," as there can be no heirs of a person until after his death.<sup>11</sup> Where a deed is made to A, "and to the

<sup>1</sup> Brantly v. Kee, 5 Jones Eq. 332.

<sup>2</sup> Patterson v. Carneal, 3 Marsh. A. K. 618; 13 Am. Dec. 208; Lambert v. Smith, 9 Or. 185.

<sup>3</sup> Davis v. Handy, 37 N. H. 65.

<sup>4</sup> Kenyon v. Nichols, 1 R. I. 411.

<sup>5</sup> Kenyon v. Nichols, *supra*.

<sup>6</sup> Folk v. Varn, 9 Rich. Eq. 303.

<sup>7</sup> Gordon v. Haywood, 2 N. H. 402.

<sup>8</sup> Wilson v. Inloes, 6 Gill, 121.

<sup>9</sup> Revere v. Leonard, 1 Mass. 91.

<sup>10</sup> Hutchins v. Carleton, 19 N. H. 487. Said the court: "'Assign and make over' are as effectual, when a good consideration is expressed, as 'quit my claim,' or many other forms that have been sanctioned as sufficient to raise a use or pass an estate": See Jackson v. Alexander, 3 Johns. 484; 3 Am. Dec. 517.

<sup>11</sup> Read v. Fite, 8 Humph. 328. See Tucker v. Tucker, 78 Ky. 503; Twelves v. Nevill, 39 Ala. 175. For instances in which the courts have said that the word "heirs" was necessary to create a fee, or have construed the term, see Jarvis v. Quigley, 10 Mon. B. 104; Cromwell v. Winchester, 2 Head, 389; Duffum v. Hutchinson, 1 Allen, 58; Baker v. Hunt,

children of said A, and assigns forever," the children of the grantee, born subsequently to the execution of the deed do not take an interest in the land.<sup>1</sup> The words "all mineral or magnesia" of any kind, occurring in a reservation in a deed, include chromate of iron subsequently found upon the land.<sup>2</sup> The water power appurtenant to a mill will pass under the term "appurtenances." It is not necessary to use the word "privilege," although it may have been used in the precedent contract of sale.<sup>3</sup> But an entire railroad will not pass to another railroad by the use of the word "appurtenance" only.<sup>4</sup> The words "and all the buildings thereon," occurring in a conveyance of land, are superfluous, and have no legal operation.<sup>5</sup> Concerning the word "about," in describing the length of a line, Weston, J., said: "By the use of the term 'about,' it may be understood that direct precision in the length

40 Ill. 264; 89 Am. Dec. 346; *Williams v. Allen*, 17 Ga. 81; *Calmes v. Buck*, 4 Bibb, 453; *Kay v. Connor*, 8 Humph. 624; 49 Am. Dec. 690; *Leitensdorfer v. Delphy*, 15 Mo. 160; 55 Am. Dec. 137; *Young v. Marshall*, Hill & D. Sup. 93; *Roberts v. Forsyth*, 3 Dev. 26. For cases in which the words "more or less" have been construed, see *Tyson v. Hardesty*, 29 Md. 305; *Blaney v. Rice*, 20 Pick. 62; 32 Am. Dec. 204; *Brady v. Hennon*, 8 Bosw. 528; *Phipps v. Tarpley*, 24 Miss. 597; *Gentry v. Hamilton*, 3 Ired. Eq. 376; *Hoffman v. Johnson*, 1 Bland, 103; *Baynard v. Eddings*, 2 Strob. 374; *Hunt v. Stull*, 3 Md. Oh. 24; *Sullivan v. Ferguson*, 40 Mo. 79; *Nelson v. Matthews*, 2 Hen. & M. 164; 3 Am. Dec. 620; *Poague v. Allen*, 3 Marsh. J. J. 421; *Davis v. Sherman*, 7 Gray, 291; *Ship v. Swan*, 2 Bibb, 82. If it appears, from the terms of the deed, and the circumstances connected with its execution, that the grantor meant children, although he used the word "heirs," effect will be given to it accordingly, and the deed will not be defeated by the general rule that a conveyance to the heirs of a living person is void: *Heath v. Hewitt*, 127 N. Y. 166; 24 Am. St. Rep. 438. See, also, *Vickars v. Leigh*, 104 N. C. 248; *Griswold v. Hicks*, 132 Ill. 494; 22 Am. St. Rep. 549; *Broliar v. Marquis*, 80 Iowa, 49. The term "heirs at law" may be construed as children or grandchildren, where such a construction will effectuate the grantor's intention, and is consistent with legal principles: *Waddell v. Waddell*, 99 Mo. 338; 17 Am. St. Rep. 575.

<sup>1</sup> *Glass v. Glass*, 71 Ind. 392.

<sup>2</sup> *Gibson v. Tyson*, 5 Watts, 34.

<sup>3</sup> *Pickler v. Stapler*, 5 Serg. & R. 109.

<sup>4</sup> *Philadelphia v. Philadelphia etc. R. R. Co.*, 58 Pa. St. 253.

<sup>5</sup> *Crosby v. Parker*, 4 Mass. 110.



of line was not intended.”<sup>1</sup> If, however, the place of the monument by which the distance was controlled and determined cannot be ascertained, the right of the grantee is confined to the number of rods or feet given. But the original location, in such a case, may be shown by evidence of continued possession.<sup>2</sup> The words “to her and her representatives,” in a limitation by deed, can signify no more than her executors and administrators. Having no legal effect, these words should be regarded as superfluous.<sup>3</sup> Real estate will not pass by granting, assigning, bargaining, and selling to A “all and all manner of goods, chattels, debts, moneys, and all other things of me whatsoever, as well real as personal, of what kind, nature, and quality soever,” “to have and to hold the same and every part and parcel thereof, unto the said A, his executors, administrators, and assigns forever.”<sup>4</sup> An instrument, although in form a deed, is testamentary in its character if the grantor in it declares that it is made on the condition that “I reserve the right to alter, change, or entirely abolish this deed if I so desire during my life, and that I retain all of the said property during my life, and have the control of the same, and that this deed do not take effect until after my death.”<sup>5</sup>

<sup>1</sup> *Cutts v. King*, 5 Me. (5 Greenl.) 482.

<sup>2</sup> *Cutts v. King*, 5 Me. (5 Greenl.) 482. See *Purinton v. Sedgley*, 4 Me. (4 Greenl.) 286.

<sup>3</sup> *McLaurin v. Fairly*, 6 Jones Eq. 375.

<sup>4</sup> *Ingell v. Nooney*, 2 Pick. 362; 13 Am. Dec. 434.

<sup>5</sup> *Cunningham v. Davis*, 62 Miss. 366. See for a similar case, *Leaver v. Gauss*, 62 Iowa, 314. A wife's inchoate right of dower is released by a clause in a deed signed by husband and wife, stating that: “We hereby release and relinquish all right, claim, and interest whatever, in and to said lot of ground which is given by, or results from all laws of this State, pertaining to the exemption of homestead or dower”: *Attwater v. Butler*, 9 Baxt. (Tenn.) 299. But by a clause, “and in the event of sale, we waive all equity of redemption and repurchase and homestead in said property,” only the right of homestead, and not dower, is conveyed: *McKinley v. Kuntz*, 9 Baxt. (Tenn.) 299. A deed conveying a building, and “all fixtures of every description attached to said building,” will not be construed as conveying fixtures not attached to the building: *Stettauer v. Hamlin*, 97 Ill. 312. In a deed conveying several tracts of land, the grantor reserved “all the pine timber on said tracts, together with the

## PART II.

## COMMUNITY PROPERTY.

## § 865. Community property—In what States exists.—

It may be proper in this place to note some of the rules governing community property. At common law the husband and wife did not by virtue of that relation hold

right and privilege to cut, remove, take, and carry away the same, or any part thereof, at any and all times; also the right of ingress and egress at any and all times for the space of twelve years from the date above written, for the purpose so as aforesaid." The court held that the parties having determined their own time for the removal of the timber, the right of entry, as well as the right of entry therein, fell when that time expired: *Saltonstall v. Little*, 90 Pa. St. 422; 35 Am. Rep. 683. For other cases in which particular words and clauses have been construed, see *Bellamy v. Bellamy*, Adm. 6 Fla. 62; *Mundy v. Vawter*, 3 Gratt. 518; *Hall v. Thayer*, 5 Gray, 523; *Barton v. Morris*, 15 Ohio, 408; *Peaks v. Blethen*, 77 Me. 510; *Sowle v. Sowle*, 10 Pick. 376; *Dennison v. Ely*, 1 Barb. 610; *Brantly v. Kee*, 5 Jones Eq. 332; *Harris v. Elliott*, 10 Peters, 25; *Hutchins v. Carleton*, 19 N. H. 487; *Braman v. Dowse*, 12 Cush. 227; *Melsheimer v. Gross*, 58 Pa. St. 412; *Smith v. Read*, 51 Conn. 10; *Perry v. Calhoun*, 8 Humph. 551; *Hawk v. McCullough*, 21 Ill. 220; *Mulford v. Le Franc*, 26 Cal. 88; *McLeroy v. Duckworth*, 13 La. Ann. 410; *Brackett v. Bidlon*, 54 Mo. 423; *Blossom v. Van Court*, 34 Mo. 390; 86 Am. Dec. 114; *King v. Gilson*, 32 Ill. 348; 83 Am. Dec. 269; *Schenley v. Pittsburgh*, 104 Pa. St. 472; *Claunch v. Allen*, 12 Ala. 159; *Muller v. Boggs*, 25 Cal. 175; *Roebuck v. Duprey*, 2 Ala. 535; *Brenham v. Davidson*, 51 Cal. 352; *Powell v. Lyles*, 1 Murph. 348; *Rickets v. Dickens*, 1 Murph. 343; 4 Am. Dec. 555; *Williams v. Allen*, 17 Ga. 81; *Cromwell v. Winchester*, 2 Head, 389; *Adams v. Marshall*, 138 Mass. 228; 52 Am. Rep. 271; *Hartman v. Read*, 50 Cal. 485; *Latham v. Morgan*, 1 Smedes & M. 611; *Carter v. Soulard*, 1 Mo. 576; *Gratz v. Ewalt*, 2 Binn. 95; *Whitehill v. Gotwalt*, 3 Pa. 113; *Prettyman v. Wilkey*, 19 Ill. 235; *Seitzinger v. Weaver*, 1 Rawle, 377; *Freeman v. Pennock*, 3 Pa. 313; *Calmes v. Buck*, 4 Bibb, 453; *Fratt v. Toomes*, 48 Cal. 28; *Hartwell v. Camman*, 10 N. J. Eq. (2 Stockt. Ch.) 128; 64 Am. Dec. 448; *Jarvis v. Quigley*, 10 Mon. B. 104; *Leitensdorfer v. Delphy*, 15 Mo. 160; 55 Am. Dec. 137; *Young v. Marshall, Hill & D. Sup.* 93; *Roberts v. Forsyth*, 3 Dev. 26; *Kirkendall v. Mitchell*, 3 McLean, 144; *American Academy of Music v. Smith*, 54 Pa. St. 130; *Newmarket v. Smart*, 45 N. H. 87; *Congregational Society v. Stark*, 34 Vt. 243; *Bradley v. Rice*, 13 Me. 198; 29 Am. Dec. 501; *Gambril v. Doe*, 8 Blackf. 140; 44 Am. Dec. 760; *Slosson v. Lynch*, 43 Barb. 147; *Swiney v. Swiney*, 14 Lea (Tenn.), 316; *Close v. Burlington, Cedar Rapids etc. Ry. Co.*, 64 Iowa, 149; *Wallace v. Miller*, 52 Cal. 665; *Montgomery v. Sturdivant*, 41 Cal. 290; *Talbert v. Hopper*, 42 Cal. 397; *Vance v. Peña*, 33 Cal. 631; *Stafford v. Lick*, 10 Cal. 12; *Chapman v. Excelsior Canal Co.*, 17 Cal. 231; *Stanway v. Rubio*, 31 Cal. 41; *Peaks v. Blethen*, 77 Me. 510; *Adams v. Marshall*, 138 Mass. 228; 52 Am. Rep. 271; *Kemp*

property in joint ownership. We shall not stop here to consider the property rights of husband and wife as they existed at common law, but pass to the consideration of what, in some of the States of the Union, is made, by statutory provisions, community property. The statutes of California may be selected as an example. In that State, the Code provides: "All property of the wife, owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband convey her separate property."<sup>1</sup> "All property owned by the husband before marriage, and that acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."<sup>2</sup> "All other property acquired after marriage, by either husband or wife, or both, is community property."<sup>3</sup> In other States, where earnings subsequent to marriage are made community property, similar statutes exist. In Texas, it is provided: "All the effects which both husband and wife reciprocally possess at the time of the marriage may be dissolved, and shall be regarded as common effects or gains, unless the contrary be satisfactorily proved."<sup>4</sup> "All property, both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of lands, or slaves thus acquired, shall be his

*v. Bradford*, 61 Md. 330; *Pugh v. Mays*, 60 Tex. 191; *Warner v. Sandusky*, *Mansfield etc. R. R. Co.*, 39 Ohio St. 70; *Hummelman v. Mounts*, 87 Ind. 178; *Weir v. Simmons*, 55 Wis. 637; *Maker v. Maker*, 74 Me. 104. See, also, *Arnold v. Hymer*, 2 McCrary, C. C. 631; *Cannon v. Barry*, 59 Miss. 289; *Steuart v. Gage*, 59 Miss. 558; *Bailey v. Willis*, 56 Tex. 212; *Little v. Allen*, 56 Tex. 133; *Lunt v. Lunt*, 71 Me. 377; *Powers v. Patten*, 71 Me. 583; *Bronson v. Lane*, 91 Pa. St. 153; *Tift v. Buffalo*, 82 N. Y. 204; *Blair v. Osborne*, 84 N. C. 417; *Jeffrey v. Hursh*, 42 Mich. 563; *Look v. Kenney*, 128 Mass. 284; *Eysaman v. Eysaman*, 24 Hun, 430; *Hinkle v. Hinkle*, 69 Ind. 124; *Atkinson v. Dixon*, 70 Mo. 381; *Gilkey v. Shepard*, 51 Vt. 546; *Bouknight v. Epting*, 11 S. C. 71; *Rankin v. Warner*, 2 Lea (Tenn.), 301; *Newman v. Ashe*, 9 Baxt. (Tenn.) 380.

<sup>1</sup> Civil Code Cal. § 162.

<sup>2</sup> Civil Code Cal. § 164.

<sup>3</sup> Civil Code Cal. § 163.

<sup>4</sup> Paschal's Tex. Dig. art. 4639.

separate property. All property, both real and personal, of the wife owned or claimed by her before marriage and that acquired by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife."<sup>1</sup> "All property acquired by either husband or wife during the marriage, except that which is acquired in the manner specified in the preceding section, is common property."<sup>2</sup> Statutes to the same effect exist in the States of Louisiana and Nevada, and in Idaho, Arizona, and Washington Territories.<sup>3</sup>

§ 866. **The civil law.**—The rule as to the property rights of husband and wife in the civil law, is thus stated by Mr. Burge: "There is a marked distinction between the civil law and other systems of jurisprudence in the civil rights and capacities of the husband and wife. It does not recognize in the husband and wife that union of persons, by which the rights of the wife were incorporated and consolidated during the coverture with those of the husband. It does not, therefore, sub-

<sup>1</sup> Paschal's Tex. Dig. art. 4641.

<sup>2</sup> Paschal's Tex. Dig. art. 4642.

<sup>3</sup> Louisiana Civil Code, § 2371; Comp. Laws of Nevada, p. 56, §§ 151, 152; Comp. Laws of Arizona, ed. 1877, p. 328, §§ 1967-1969; Laws of Idaho, Session 1866-67, p. 65, §§ 1, 2; Code of Washington Ty., ed. 1881, §§ 2400-2411. See generally on the question of community property, *Rich v. Tubbs*, 41 Cal. 34; *Le Blanc v. Le Blanc*, 20 La. Ann. 207; *Dunham v. Chatham*, 21 Tex. 247; 73 Am. Dec. 228; *Brown v. Cobbs*, 10 La. 181; *Rice v. Rice*, 21 Tex. 66; *Hughey v. Barrow*, 4 La. Ann. 249; *Comeau v. Fontenot*, 19 La. 407; *Menchaca v. Field*, 62 Tex. 135; *Cannon v. Murphy*, 31 Tex. 407; *Pancoast v. Pancoast*, 57 Tex. 1320; *Porter v. Chronister*, 58 Tex. 53; *Simeon v. Perrodin*, 35 La. Ann. 931; *Lake v. Lake*, 52 Cal. 428; *Sexton v. McGill*, 2 La. Ann. 190; *Morris v. Covington*, 2 La. Ann. 259; *Lawson v. Ripley*, 17 La. 251; *Denegre v. Denegre*, 30 La. Ann. pt. 1, 275; *Lewis v. Lewis*, 18 Cal. 659; *Howard v. York*, 20 Tex. 670; *George v. Ransom*, 15 Cal. 323; 76 Am. Dec. 490; *De Blane v. Hynch*, 23 Tex. 28; *Cartwright v. Cartwright*, 18 Tex. 296; *Spear v. Ward*, 20 Tex. 674; *Forbes v. Dunham*, 24 Tex. 611; *Bateman v. Bateman*, 25 Tex. 270; *Bonner v. Gill*, 5 La. Ann. 630; *Ducresc v. Bijean*, 8 Martin, N. S., 198; *Love v. Robertson*, 6 Tex. 6; 56 Am. Dec. 41; *Pearce v. Jackson*, 61 Tex. 642; *Johnson v. Burford*, 39 Tex. 242; *Claiborne v. Tanner*, 18 Tex. 72; *McAllister v. Farley*, 39 Tex. 552.

ject her to those civil disabilities which must have resulted from that union. The husband and wife are regarded as distinct persons, with separate rights, and capable of holding distinct and separate estates. The wife was alone responsible for and might be sued, and was competent to sue, on her own contracts and engagements, and the husband could not subject her or her property to any liability for his debts or engagements. The *communio bonorum*, which is to be found in so many systems of jurisprudence, might have been part of the Roman law at an earlier period of its history, but it had long before the compilation of the digest fallen into disuse. The parties might, by their nuptial agreement, adopt it, but it had then ceased to be a provision of the law. The peculiarities of the civil law in these respects, may be referred to the disuse into which the formal rites of marriage, *per confarreationem et coemptionem*, had fallen. Marriages celebrated according to those rites, gave to the husband and wife a community of interest in the property of each other. By the marriage *per coemptionem*, the husband was considered to have purchased his wife. She ceased to be under her parental power, and became subject to the power of her husband. All her property belonged to him, and she succeeded to it on his death. Long before the reign of Justinian, marriages *per usum*, that is by cohabitation as man and wife, had superseded the more formal marriages. The marriage *per usum* did not alter the *status* of the female, nor subject her to the marital power, but she still remained under that of her father.”<sup>1</sup> The *dos* was the property brought by the wife at the marriage, contributed either by herself, or by some other person for her benefit. The husband contributed his *donatio propter nuptias*, or *antidos*, but in all other property they each retained the same rights as they would have if unmarried.<sup>2</sup> “The husband acquires a *dominium* in the dotal property, which is determinable

<sup>1</sup> 1 Burge, Colonial and Foreign Laws, 263, 264.

<sup>2</sup> 1 Burge, Colonial and Foreign Laws, 264.

on the dissolution of the marriage, unless he has become the purchaser of it at an estimated value. In that case, although it is not determinable, it is competent for the wife, if he be insolvent, to recover so much of the dotal property as still remains in his possession. The husband, in respect of his *dominium*, may recover in his own name any part of it which is withheld. He may even institute an action against his wife, if she has withdrawn any part of it. He has the administration and management of the dotal property, and receives for his own use its annual fruits, rents, and profits, in consideration of which he sustains the expenses incident to the marriage. If a debt owing by him to his wife be the subject of *dos*, he is not chargeable with interest on it during the coverture. He has the power of alienating such part of the dotal property as is personal, but he cannot, even with her consent, alienate or subject to any charge or encumbrance any part of it which is immovable or real, unless he had become the purchaser of it at an estimated price. An alienation or a charge on the dotal immovable property is, *ipso jure*, void. But it may be sustained, if the wife has for two years after the alienation consented to it, or the price for which it has been sold has been invested in the purchase of real property, or equally advantageous.”<sup>1</sup>

§ 867. In other countries.—According to the Code Napoleon, the community is composed actively: “1st. Of all the movable property which the married parties possessed at the time of the celebration of the marriage, together with all movable property which falls to them during the marriage, by title of succession, or even of donation, if the donor have not expressed himself to the contrary. 2d. Of all the fruits, revenues, interests, and arrears, of what nature soever they may be, fallen due or received during the marriage, and arising from property which belonged to the married persons at the time of the

<sup>1</sup> Burge, Colonial and Foreign Laws, 269, 270.

celebration, or from such as have fallen to them during the marriage by any title whatsoever. 3d. Of all the immovables which are acquired during the marriage.”<sup>1</sup> “Every immovable is reputed to have been acquired in community, unless it be proved that one of the married parties had the property or legal possession thereof at a period anterior to the marriage, or that it has fallen to such party since, by title of succession or donation.”<sup>2</sup> “The immovables which married persons possess on the day of the celebration of the marriage, or which fall to them during its continuance by title of succession, do not enter into community. Nevertheless, if one of the married persons have acquired an immovable subsequently to the contract of marriage containing condition of community, but before the celebration of the marriage, the immovable acquired in such interval shall enter into community, unless the acquisition have been made in the execution of some article of marriage; in which case it shall be regulated according to the agreement.”<sup>3</sup> “Donations of immovables which are made during marriage to one only of the married parties, do not fall into community, but belong to the donee only, unless the donation expressly declare that the thing given shall belong to both in community.”<sup>4</sup> “An immovable, abandoned or ceded by the father, mother, or other ancestor to one of the two married parties, either to satisfy what shall be owing to such party, or on condition of paying debts due from the donor to strangers, does not enter into community, saving compensation, or indemnity.”<sup>5</sup> “An immovable acquired during marriage, by title of exchange for an immovable belonging to one of the two married parties, does not enter into community, but is substituted instead and in place of that which was alienated, saving

<sup>1</sup> Code Napoleon, Richards' Translation, § 1401.

<sup>2</sup> Code Napoleon, § 1402.

<sup>3</sup> Code Napoleon, § 1404.

<sup>4</sup> Code Napoleon, § 1405.

<sup>5</sup> Code Napoleon, § 1406.



recompense if there be any difference of value.”<sup>1</sup> The civil law with modifications also prevails in Holland and in Spain.<sup>2</sup>

<sup>1</sup> Code Napoleon, § 1407. See Code of Lower Canada, §§ 1268, 1269, 1270, 1384. The community is composed passively: 1st. Of all personal debts which the married parties were encumbered on the day of the celebration of their marriage, or with which those successions were charged, which fell to them during the marriage, saving compensation for those relating to immovables proper to one or the other of the married parties. 2d. Of debts, as well in capital sums as in arrears of interest, contracted by the husband during the community, or by the wife with her husband's consent, saving compensation in cases where there is ground for it. 3d. Of those arrears and interest only of rents or debts due to others which are personal to the two married parties. 4th. Of usufructuary repairs of immovables which do not enter into community. 5th. Of alimony of married persons, of the education and maintenance of children, and of every other charge of marriage.”

<sup>2</sup> Mr. Burge says concerning the law of Holland: “The provisions of the civil law, which establish the *dos* and *antidos*, and allow the husband and wife to retain the separate and absolute ownership of the rest of their property, might be adopted by parties in their nuptial contracts, but they formed no part of the law of Holland. The property of the husband and wife, and their rights and interests, *stante matrimonio*, are subject either to the disposition which they have themselves made by contract on their marriage, or to that which the law makes. . . . By the law of Holland, the *communio bonorum* took place as the immediate consequence of marriage, and commenced from the moment of its celebration, either in *facie ecclesiae*, or before the magistrate. But according to some codes, the title to it was not complete, unless there had been an *ingressusthori*, whilst others required that there should have been *annua cohabitatio et convictus*. The *communio bonorum* prevails, unless the husband and wife have, by an antenuptial contract, excluded it. They may exclude it wholly or in part. Thus, the *communio questuum* may be retained, and the other excluded. The exclusion may be made in express terms, or implied from the dispositions which are contained in the antenuptial contract”: Colonial and Foreign Laws, vol. 1, pp. 276, 278. Concerning the law of Spain, Mr. Burge says: “The law of Spain does not recognize the general *communio bonorum*, which prevailed in Holland, but admits only the *communio questuum*. The latter is constituted between the husband and wife as the legal and necessary effect of their marriage. The property of which it consists is termed *ganancial*, *bienes gananciales*. . . . The community silently and imperceptibly acquired a place among the usages of Spain. It was first recognized in El Fuero Juzgo. The property of which it is formed belongs in common to the two consorts, and on the dissolution of the marriage, is divisible between them in equal shares. It is confined to their future acquisitions, *durante el matrimonio*. The property belonging to either at the time of the marriage, by whatever title it was acquired, *patrimonium et capitale*,

§ 868. **Presumption of community property.** — It may be observed, in considering the effect given to these statutes, that all property acquired by either party after marriage is presumed to be community property. "Property acquired by purchase during coverture, by either party, is presumed to be community property, whether the consideration was services rendered or money paid by either party."<sup>1</sup> So, therefore, a party who asserts that property acquired during the life of the wife, or with funds in his hands at the time of her death, is his separate property, has the burden of proof.<sup>2</sup> Mr. Justice Field, in a case in California, speaking of the law of California as regards community property, said: "These provisions are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrine of the common law in respect to the rights of property consequent upon

forms no part of it. But its *fructus*, or rents and profits, are included in it, and are therefore *ganancial*. The acquisitions during the marriage by a common title, whether it be lucrative or onerous, will form part of the community. Thus, a donation made to *both* consorts will be *ganancial*, but a donation made to either, although it be made to the wife by the husband's relations, or to the husband by the wife's relations, will be the separate and exclusive property of such donee, and form no part of the community. The title under which property acquired by the one consort can become *ganancial* must be that which is onerous. An estate, therefore, which was purchased by either consort will be *ganancial*. All property is *prima facie* presumed to be *ganancial* which is not proved to be *proprium* or *patrimonium*": Colonial and Foreign Laws, vol. 1, pp. 418, 419.

<sup>1</sup> Chapman v. Allen, 15 Tex. 278, 283. See, also, Biggi v. Biggi, 98 Cal. 33; Althof v. Conheim, 38 Cal. 230; 99 Am. Dec. 363; Morgan v. Lones, 78 Cal. 58; Burton v. Lies, 21 Cal. 87; Smith v. Smith, 12 Cal. 216; 73 Am. Dec. 533; Tolman v. Smith, 85 Cal. 280; Ingersoll v. Truebody, 40 Cal. 603; Ramsdell v. Fuller, 28 Cal. 37; 87 Am. Dec. 103; McDonald v. Badger, 23 Cal. 393; 83 Am. Dec. 123; Pixley v. Huggins, 15 Cal. 127; Schuyler v. Broughton, 70 Cal. 282; Landers v. Bolton, 26 Cal. 393; Moore v. Jones, 63 Cal. 12; Adams v. Knowlton, 22 Cal. 283; Jordan v. Fay, 98 Cal. 264; Dimmick v. Dimmick, 95 Cal. 323; Peck v. Brummagim, 31 Cal. 440; 89 Am. Dec. 195; Meyer v. Kinzer, 12 Cal. 247; 73 Am. Dec. 538.

<sup>2</sup> Osborn v. Osborn, 62 Tex. 495. See, also, Dimmick v. Dimmick, 95 Cal. 323; Peck v. Brummagim, 31 Cal. 440; 89 Am. Dec. 195; Meyer v. Kinzer, 12 Cal. 247; 73 Am. Dec. 538; Estate of Bauer, 79 Cal. 304; Tolman v. Smith, 85 Cal. 280; McComb v. Spangler, 71 Cal. 418.

marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage, or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community; exceptions to the rule must be proved. . . . This invariable presumption which attends the possession of property by either spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterward in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment, or as the price of property so originally owned or acquired. The burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion, and fraud. In vain would creditors or purchasers attempt to show that the particular property seized, or bought, was *not* owned by the claimant before marriage, and was *not* acquired by gift, bequest, devise, or descent, or was *not* such property under a new form consequent upon some exchange, sale, or investment. In vain would they essay to trace through its various changes, the disposition of any separate estate of the wife, so as to exclude any blending of it with the particular property which might be the subject of consideration.”<sup>1</sup> Where a husband after marriage purchases land with his separate funds, he may take the conveyance in the name of his minor children by a former wife, and such action cannot

<sup>1</sup> In *Meyer v. Kinzer*, 12 Cal. 247, 251; 73 Am. Dec. 538.

be considered to be a fraud upon the rights of the wife.<sup>1</sup> But if, during the existence of the marriage relation, the husband erects a building on such land, the presumption that the community property was invested in this form cannot be repelled by loose and unsatisfactory evidence.<sup>2</sup>

**§ 869. Grants from the government—Rule in Texas.** Property acquired by one party from the government, under a grant or a donation, is considered, in Texas, to be community property.<sup>3</sup> In a late case in that State, Mr.

<sup>1</sup> *Smith v. Smith*, 12 Cal. 216; 73 Am. Dec. 533.

<sup>2</sup> *Smith v. Ward*, 12 Cal. 216. See, also, *Schuler v. Savings and Loan Society*, 64 Cal. 398; *Althof v. Conheim*, 38 Cal. 230; *Barbour v. Fairchild*, 6 L. C. Rep. 113; *City Insurance Co. v. Steamboat Lizzie Simmons*, 19 La. Ann. 249; *Schmeltz v. Garey*, 49 Tex. 49; *Planchett's Succession*, 29 La. Ann. 520; *Bouligny v. Fortier*, 16 La. Ann. 213; *Provost v. Delahoussaye*, 5 La. Ann. 610; *Ochapman v. Alden*, 15 Tex. 278; *Sulstrang v. Belts*, 24 La. Ann. 235; *Block v. Melville*, 22 La. Ann. 149; *Tally v. Heffner*, 29 La. Ann. 583; *Huston v. Curl*, 8 Tex. 242; 58 Am. Dec. 110; *Cooke v. Bremond*, 27 Tex. 457; 86 Am. Dec. 626; *Zorn v. Tarver*, 45 Tex. 419; *Love v. Robertson*, 7 Tex. 11; 54 Am. Dec. 41; *Mitchell v. Marr*, 26 Tex. 331; *Higgins v. Johnson*, 20 Tex. 394; 70 Am. Dec. 394; *Succession of Wade*, 21 La. Ann. 347; *Smalley v. Lawrence*, 9 Rob. (La.) 214; *Ford v. Ford*, 1 La. 201; *Fisher v. Gordy*, 2 La. Ann. 763. In *Ford v. Ford*, 1 La. 201, the court said: "The principles laid down in the last article of the code cited, creates a legal presumption that property acquired during marriage by purchase, whether the acquisition be made in the joint names of husband and wife, or in the names of either separately, must be considered as common property, which can be defeated only by certain and positive evidence that it was acquired by the separate funds of one of the parties." The statute in California, section 164 of the Civil Code, has, however, been amended by providing that when property is conveyed to a married woman by an instrument in writing, the presumption is that the title is vested in her as her separate property, and if to her and her husband, the presumption is that she takes as tenant in common. See *Heney v. Pesoli*, 109 Cal. 53.

<sup>3</sup> *Yates v. Houston*, 3 Tex. 433. In this case the court, in considering this question, said: "It would seem that where the government requires, by public order, a sum of money so considerable in amount to be paid before the issue of the title, and as an indispensable condition to its delivery, that the grant could not be regarded as a pure donation. Nor can it be regarded as bought with the separate funds of the husband. There is no provision of law which requires or authorizes the separate property of the head of the family to be expended for this purpose; and where there is no showing to the contrary, the presumption always is, that the advances proceed from the funds of the community, and pur-

Justice Bonner said: "The policy of Texas has ever been to induce by grants of land both married and single men to immigrate and become citizens. In consonance with the objects sought, greater inducements have been held

chases are made for its benefit and augmentation. The fact that the grant was made to the head of the family is an immaterial circumstance, provided it was founded on considerations which impress upon it the character of a purchase, or of property acquired by onerous title. The head-right grants under the State colonization laws, in which some consideration was paid for the land itself, were made to the heads of families. And if, by law, lands were expressly directed to be sold to families, to a greater or less amount, according to the merits and circumstances of the applicants, and the grants were made in the name of the head of the families, it could not be contended that such lands were the separate property of the husband. Is there any substantial difference between such sales and this grant, where the title was, by public authority, directed not to issue until after the fees were paid? But, on the second ground, we are of opinion that the grant was in consideration of services to be rendered, and should, therefore, be regarded as a portion of the *ganancial* property of the marriage. The object of the government in the law of colonization, was to settle the vast wilderness of a remote frontier with a reputable, hardy, and industrious population. 'Agriculture, industry, and the arts,' were to be promoted, and to accomplish this, grants of a large amount of land were offered to emigrant families, but not gratuitously; not simply on the ground that they would introduce themselves into the country; but that they should cultivate the lands, and that within two years from the date of the concession. The inquiry then arises, by whom is this to be accomplished? Are we to suppose that the husband is the sole cultivator? That fields are to be opened, and lands stocked with cattle, without the assistance of his partner, and the expenditure of their joint funds? And, in fact, it seems immaterial whether the whole of the labor and money be bestowed and expended by the husband or not, provided such was the necessary condition and charge by which title could alone be originally acquired, or subsequently preserved. By the principles of the law then existing, the results of the labor of the partners, and of each one of them, became common property. It is of no consequence whether one contribute more than the other to the acquisition, or whether it be procured by the labor and traffic of one alone, it is common to both by virtue of the subsisting partnership, through which their acquisitions are reciprocally communicated. The position is fallacious which assumes that the land is already granted, and that the labors of the wife are repaid by her community interest in the value of the improvements made, or cattle pastured on the land. If the land can be retained only by services to be rendered, or labors performed, by both of the partners, or by one, and the profits by law accrue to both, it would be inequitable that the labors of the one should be rewarded by the land and half of the improvements, and that of the other by only half of the latter. To this she

out to the former class, as shown by the increased amount of land given. Although the certificate of title, under the law, issued to the husband as the head of the family, yet, in consideration of the joint toils, privations, and dangers undergone by the wife also, it has been repeatedly decided by this court that, under our system, it would constitute community property of the husband and wife, one-half of which, charged with the debts of the community, would, on the death of the wife, descend to her children.”<sup>1</sup> But it has been held in that State that, where the land was selected by the husband prior to the death of the wife, but the title was not extended to him until after her death, the land did not become community property.<sup>2</sup> In Texas, the true test to be derived from the authorities is said to be: “1st. Did the surviving husband receive the grant by reason of such immigration,

would be entitled on property brought by the husband into the marriage as his separate estate, and of which the title was fully vested in him, and to procure or preserve which no expenditure of labor or money is necessary; but where these expenditures and services can alone procure and secure the title, she should certainly be entitled to an equal share of the reward bestowed. These grants were, in fact, dearly purchased by the unparalleled toils and sufferings of both the partners; and the fruits of their labors under a system of laws where the community interests are protected with such zealous vigilance should be equally distributed. It cannot be said, that if the land be not appropriated exclusively to the husband, each member of the family is as much entitled to a distributive share as the wife, inasmuch as the services of the whole are rendered to secure the title. This is answered by the consideration that, under the laws, the services of the family are always to be rendered for the benefit of the community, and not for its individual members, especially those in a subordinate relation. The law was framed to secure the migration of women as well as men. Their presence was indispensable to the domestic happiness of individuals, and to the order, welfare, and continued existence and prosperity of the colony. It cannot be supposed that a legislator, under the Spanish system, would intend that, in a grant to be made to a family, consisting of a husband, wife, and children, and this on onerous conditions, that the rights of the wife, as partner in the conjugal society, should be disregarded. The presumptions of law strongly favor the rights of the community, and they should have their due force where the law is not too clear to exclude their operation.”

<sup>1</sup> *Hodge v. Donald*, 55 Tex. 344. And see *Wilkinson v. Wilkinson*, 20 Tex. 242.

<sup>2</sup> *Webb v. Webb*, 15 Tex. 274.



settlement, residence, etc., on his own part, as would, under the law, entitle him to it, independently of the right based upon his *status* as a married man at the date of the death of his wife? If so, it was his separate property. 2d. Was the increased quantity over that to which a single man, not the head of a family, was entitled, given to the surviving husband by reason of the fact that, at the date of the death of the wife, he was then a married man? If so, it was the community property of the husband and the deceased wife, her half-interest in which, subject to the debts of the community, would descend to her children.”<sup>1</sup>

§ 870. **In California and Louisiana.**—In California, the rule prevailing in Texas on the point considered in the previous section is disapproved. Referring to an early case in Texas, cited in the preceding section,<sup>2</sup> the supreme court of California said: “The error, as we conceive, of this decision, consists in regarding the fees paid to the officers, and the services rendered in settling upon the land, as constituting a valuable consideration in the nature of a price to the government. The fees incurred in making the survey, and in issuing the title papers, were altogether incidental to the grant and formed no part of its consideration, and the services rendered in the settlement were directly for the benefit of the grantee, and only collaterally and remotely for the benefit of the government. Agricultural lands solicited under the colonization laws were supposed to be for use and cultivation by the petitioner, and the grant to him was only subject to their appropriation to that end. Such limitation could not affect the character of the grant as a donation, and convert it into a purchase. The government, in fact, said to the petitioner, if you want the lands for use and cultivation, you may have them for that purpose; in other words, we will give them to you if you will use them. Con-

<sup>1</sup> *Hodge v. Donald*, 55 Tex. 344, 350.

<sup>2</sup> *Yates v. Houston*, 3 Tex. 433.



ditions which require the performance of services are not onerous in the sense of the Spanish law, so as to convert the transaction into one of contract, when they are rendered by the grantee for his own benefit; they are only so when rendered for the benefit of the grantor, or parties other than the grantee. They do not differ in that respect from the payment of money, which it would be absurd to say could be made by the grantee to himself."<sup>1</sup> In Louisiana, the court in speaking of these grants observed: "It was, however, said that the object in making these grants was to encourage the settlement of the country; and that to carry that object into effect it was necessary the lands should be considered as given to both husband and wife. To this it might be answered, and with great force, that if the government were of that opinion, it is strange they did not at once say so, and by making the concession in the name of both, place the matter beyond doubt; and not, by granting it to one of the spouses, leave it to the operation of a

<sup>1</sup> In *Noe v. Card*, 14 Cal. 576, 600. On a petition for rehearing Mr. Chief Justice Field said (p. 610): "Under all systems, donations are of three classes—pure, remuneratory, and conditional. They are pure when made without condition in the exercise of a spirit of liberality as charities. They are remuneratory when required by no legal obligation, but are made from a regard for services rendered. Such were pensions; such was the character of the grants of land made in many instances to officers of the Revolution. They are conditional when accompanied with provisions intended to secure the purposes for which they are made. These provisions may often impose the discharge of burdensome and expensive duties without changing the character of the transactions. Grants of land for institutions of benevolence or instruction, for hospitals, schools, asylums, and the like, are generally of this class. Conditions annexed to such grants, that the institutions shall be established, only operate as a requirement that the lands shall be appropriated for the purposes for which they are granted. The performance of the condition does not constitute a consideration in the nature of a price, thereby converting the transaction into sales. This is so obviously true as to require no argument for its support. The counsel appears to be impressed with a conviction that the annexation of conditions which require labor or expenditures, necessarily converts grants into sales. That such is the effect only of conditions, the performance of which is for the benefit of the grantors or persons other than the grantees, we think we have shown in the opinion already rendered."

positive law which repelled the idea. But if we could enter into political considerations, in order to ascertain whether they could repeal statutes, we would, in this case, be led to the examination of a nice and refined question of policy, in relation to the effect on national prosperity, of giving to the wife a distinct interest in the property acquired during marriage; one on which men would be found to differ, according to their education and particular modes of thinking. Some nations whose fate has been as prosperous as those of any community with whose history we are acquainted, proceed on an entirely opposite principle, and act on the idea that domestic felicity, and consequently public happiness, are best promoted by considering the acquisitions made during coverture as belonging to the husband alone. It is true the Spanish law viewed this matter in a very different light, but the same law makes a positive exception in respect to donations, and the political consideration is surely not so clear as to authorize us to make a distinction where the legislator has made none. On the contrary, it may be as readily conceived that those to whose care the colonization of this country was intrusted, though strangers might be invited into it, and settlements formed with as much facility by giving all the land to the husband, as by giving it to the husband, wife, and children. The father, as head of the family, had a right to select his place of residence; the wife was bound to follow him. It was natural he should go to the place where the most advantages were conferred *on him*; where he knew in the event of losing his life from the perils and sufferings of a first settlement, that the objects which induced him to come there would go to his children; and not be divided with those of another bed, in case his wife survived him and married another man.”<sup>1</sup>

<sup>1</sup> *Frique v. Hopkins*, 4 Martin, N. S., 212, 219. In *Gayoso de Lemos v. Garcia*, 1 Martin, N. S., 324, 333, the court say: “The title of the plaintiffs is founded on a grant made to their father during marriage, and it has been urged that the land thus acquired entered into and made a part of the community subsisting between husband and wife. Whatever

§ 871. Land purchased by earnings of wife.—Property purchased with money earned by the wife during marriage is community property unless it appear that the husband intended to give the wife the money earned by her, in which case the title taken by her would be considered a gift.<sup>1</sup> If the purchase price for a conveyance of land is formed of money due for services as a school teacher performed by the wife, the property will be presumed to belong to the community.<sup>2</sup> If a husband execute a deed to his wife, she cannot, as against a purchaser under a prior recorded deed, be considered a *bona fide* purchaser, unless the consideration for the conveyance was paid from her separate means. If the consideration paid is a part of the community property, she cannot, as she has paid herself no valuable consideration, be deemed an innocent purchaser, the deed from her husband in that case being considered as a gift.<sup>3</sup> The rule as to determining whether land purchased with money earned by the wife is her separate property or not, is not altered by the fact that the husband collected the money, executed the deed without the wife's knowledge, for the purpose of reimbursing her, nor by the fact that, as between themselves, he considered the money as the separate property of his wife.<sup>4</sup> The husband in such a case cannot act as the agent of his wife to contract with himself, without the exercise by the wife of her own will.<sup>5</sup>

support this argument may derive from the practice which we believe has prevailed in some parts of the State to regard lands granted by the sovereign as property common to both spouses, it is certain that it is not only unsupported by authority, but that the law most positively says it shall not be common to both; but that it shall belong exclusively to the individual to whom the king grants it." See, also, *Rouquier v. Rouquier*, 5 Martin, N.S., 98; 16 Am. Dec. 188; *Hughey v. Barrow*, 4 La. An. 250; *Wilkinson v. American Iron Co.*, 20 Mo. 122.

<sup>1</sup> *Johnson v. Burford*, 39 Tex. 242; *Pendergast v. Cassidy*, 8 La. Ann. 96; *Lake v. Lake*, 4 West Coast Rep. 174; *Isaacson v. Mentz*, 33 La. Ann. 595.

<sup>2</sup> *Pearce v. Jackson*, 61 Tex. 642.

<sup>3</sup> *Pearce v. Jackson*, 61 Tex. 642.

<sup>4</sup> *Pearce v. Jackson*, 61 Tex. 642.

<sup>5</sup> *Pearce v. Jackson*, 61 Tex. 642.

§ 872. **Gift to husband or wife.**—A deed of the community property to the wife by the husband, made when he is free from debts and liabilities, transfers the title to her as her separate estate. The transaction is a gift, and the property conveyed will not be liable for debts contracted by him after the execution of the deed.<sup>1</sup> Where a husband purchases land with funds belonging to the community, and causes the deed to be made out in the name of his wife, with intent that she shall hold the land conveyed as her separate property, the transaction is a gift from the husband to the wife.<sup>2</sup> The same effect results if the consideration, instead of money, is a debt due from the grantor to the husband.<sup>3</sup> The general rule is, that where a husband has a conveyance of land made to his wife, he intends it as an advancement. It might be imagined that a different rule would prevail where the principles relating to community and separate property obtain. One of the reasons advanced in favor of the rule that such a conveyance became an advancement, was that the wife could not be a trustee for the husband, and hence there was no ground for the operation of the doctrine of resulting trusts. In a case in Texas, the court, in considering the effect of a conveyance to the wife, said the principle that the wife could not be a trustee “has little or no force under our system of laws and of marital rights. The right of the wife, under our laws, to hold property, is coequal with that of the husband; and upon evidence it may be shown that property in the name of one is really held for the benefit of the other. It is very true, that the wife is under the burthen, or as the law intends, under the protection of some legal disabilities, even with reference to her separate property; but these have reference to the mode of alienation, and not to any claim of the husband over such property, *jure*

<sup>1</sup> Peck v. Brummagim, 31 Cal. 440; 89 Am. Dec. 195.

<sup>2</sup> Read v. Rahm, 65 Cal. 343; Higgins v. Higgins, 46 Cal. 259.

<sup>3</sup> Read v. Rahm, 65 Cal. 643. See, also, Morrison v. Wilson, 13 Cal. 494; 73 Cal. 593; Shanahan v. Crampton, 92 Cal. 9; Swain v. Duane, 48 Cal. 358; McComb v. Spangler, 71 Cal. 418.

*uxoris*, for he has none except that of management and its incidents. At all events, where the fundamental principle of the marital relation is, that whatever may be the unity of persons there is no unity of estates, there can be no such rule as that the wife cannot be a trustee for the husband in any sense which would preclude evidence showing that although property is in her name, it was intended for the benefit of the husband."<sup>1</sup> The court then proceeds to discuss the effect of such a conveyance under the laws of that State. "The rational foundation for the presumption of the wife is, that the purchase is intended as a provision for her; and this presumption will hold as well under our system as where the rights of the wife are not so much favored. It may, and would, under the operation of our laws, be generally more easily rebutted than it would be where the wife has no interest in community property, and a very restricted right to separate estate. The necessity for a provision would not so often exist in this State as in others, where, by operation of law, the great proportion of the wife's property is absorbed by the husband. But the necessity might and would often exist in fact. The property of the wife might not be large, or in proportion to her condition and situation in life; and in fact, though eminent advantages are afforded the wife by our laws, yet her condition is not so much enlarged as to repel the presumption of benefit from a purchase made by a husband in her name, out of her own separate funds. The legal effect and operation of the deed is to vest the property in the wife. This effect would be rebutted, in case a stranger were the nominee in the purchase. But the wife is not as a stranger to the husband. She has distinct rights and a separate estate, but he is bound for her support and maintenance, not only by law, but from the impulses of affection; and a conveyance to her, when the purchase money is advanced by himself, is not to be presumed *prima facie* an arrangement for his convenience, but as importing to the wife a

<sup>1</sup> *Smith v. Strahan*, 16 Tex. 314, 321; 67 Am. Dec. 622.

substantial benefit, and vesting in her the whole interest, as well legal as beneficial."<sup>1</sup>

**§ 872 a. Subsequently acquired title passes.**—The presumption arising from a conveyance made by a husband to his wife, where apt words of grant are used without other words in any part of the deed indicating an intention to convey a less estate, is that a fee-simple title passes to her. If the husband had, prior to the execution of the deed, executed a deed of trust to secure the payment of a debt, the reconveyance of the naked legal title subsequently by the trustees to the husband does not inure to the benefit of the community. By virtue of the husband's former grant to the wife, the title so conveyed to him by the trustees passes by operation of law to her.<sup>2</sup>

**§ 873. Voluntary gift in fraud of wife.**—While generally the husband has the sole right to alienate or encumber the property,<sup>3</sup> yet he cannot make a voluntary gift for the purpose of defrauding the wife. In an early case in California the court said: "But we think it clear that the law, notwithstanding its broad terms, will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claims of the wife."<sup>4</sup> And later the court remarked of this restriction upon his power: "This springs from the relation of the parties and their title to the property, both spouses being jointly entitled to the property, though the husband has the entire management and control of it, and can

<sup>1</sup> *Smith v. Strahan*, 16 Tex. 314, 322; 67 Am. Dec. 622. This is but a presumption, however, and not conclusive. In *Rich v. Tubbs*, 41 Cal. 84, where the husband purchased land with the separate property of his wife, taking the deed in his own name, it was held that as between the husband and wife, the land so purchased was also the separate property of the wife.

<sup>2</sup> *Klumpke v. Baker*, 68 Cal. 559.

<sup>3</sup> *Brewer v. Wall*, 23 Tex. 588; 76 Am. Dec. 76; *Ranney v. Miller*, 51 Tex. 263; *Higgins v. Johnson*, 20 Tex. 396; 70 Am. Dec. 394; *Wright v. Hays*, 10 Tex. 132; 60 Am. Dec. 200; *Prinn v. Barton*, 18 Tex. 206. But in Washington Ty., see Code, § 2410.

<sup>4</sup> *Smith v. Smith*, 12 Cal. 216, 225; 73 Am. Dec. 533.

pass the title in his name alone. All persons occupying a fiduciary relation are in a like manner disabled from disposing of the trust property, for the purpose of defrauding those who are interested in it.”<sup>1</sup> In a subsequent case the court laid down this as the law: “A deed of gift of a portion of the common property by the husband is not void *per se*. If the gift be made with the intent of defeating the claims of the wife in the common property, the transaction would be tainted with fraud. In the absence of such fraudulent intent, a voluntary disposition of a portion of the property, reasonable in reference to the whole amount, is authorized by the statute, which gives to the husband the absolute power of disposition of the common property, as of his own separate estate.”<sup>2</sup> But it seems that she cannot bring an action to set aside the conveyance during the existence of the marriage tie.<sup>3</sup> In Texas it is held that if the husband abandons the man-

<sup>1</sup> Peck v. Brummagim, 31 Cal. 440, 447, per Mr. Justice Rhodes; 89 Am. Dec. 195.

<sup>2</sup> Lord v. Hough, 43 Cal. 581, 585.

<sup>3</sup> Greiner v. Greiner, 58 Cal. 115, and cases cited. In Ray v. Ray, 1 Idaho (N. S.), 566, 579, the court, speaking of the effect of a sale after a voluntary separation and before a legal separation, say: “The point presented for our consideration is simply this: Was the sale of the property by Ray to Dangel, after the thirty-first day of January, the day of the voluntary separation by his wife, and before the legal separation was effected in the divorce suit, a valid sale, or was it a fraud *per se* upon the wife, who had, or was about to institute a suit for a divorce, and a division of the common property? The answer to this must be that the sale was a valid one, so far as it is necessary to consider it in this case. The law gave him the absolute right of disposal, as much so as if it had been his separate estate: Van Maren v. Johnson, 15 Cal. 311. The mere act of voluntary separation by the wife, even with the expressed intention of bringing her suit for a division of the property, did not of itself change the character of the community property, and vest it in herself, in her individual right. Her husband retained the same absolute control and power of disposition over it, under such circumstances, as he possessed before the separation, and any sale made by him to another in good faith, and for an adequate consideration, was as valid in law as though no separation had taken place: Lord v. Hough, 43 Cal. 585. The sale, under such circumstances, was as much for her benefit as for her husband’s. The consideration received became a substitute for the property sold as common property, and inured equally to the benefit of the husband and wife.”



agement of the community property, and deserts his wife and country, and his absence is prolonged for several years, his right of control will cease, and the wife becomes vested with the control of the common property.<sup>1</sup>

§ 874. **Title acquired after voluntary separation.**—All title acquired by either party after marriage, save by gift, devise, or descent, is community property, and its character as such is not changed by the fact that before its acquisition the parties have separated by mutual consent, but without a decree of divorce. In a case in Texas, the court considered the effect of some prior decisions determining conjugal and matrimonial rights of parties that originated under the Spanish law, which gave, under certain rules and limitations, effect to a second and putative marriage, while the parties to the first were still living, and the marriage had not been dissolved. The court said of these decisions: "But the laws under which such cases have been determined cannot be invoked, nor can those decisions furnish reason or authority to ascertain the effect of a putative marriage under a system of law which recognizes but one valid and subsisting marriage to continue and endure until death, or until it is dissolved by judicial decree. The validity under the Spanish civil law of a putative marriage carried with it the ordinary consequences of legality; it being a lawful marriage, the contract established, therefore, a community of rights between the parties to it; its legality was essential to induce that consequence. The converse must be likewise true—that if it was not a lawful marriage, the incident of community rights, which belong only to a lawful conjugal partnership, will not attach to it. The law of our State then impresses upon the marriage relation inflexible and continuous durability, and at its formation, *ipso facto*, establishes a community

<sup>1</sup> Wright v. Hays, 10 Tex. 133; 60 Am. Dec. 200; Lodge v. Levertan, 42 Tex. 21; Kelley v. Whittemore, 41 Tex. 648; Zimpelman v. Robb, 53 Tex. 281.

of interest in all property that may be thereafter acquired by either of the matrimonial partners, except that acquired by gift, grant, or descent. Under our law it may be said, as it is expressed by the Louisiana Civil Code, that every marriage superinduces, of right, partnership or community in all acquisitions. This conjugal partnership is not established upon the basis of equality of contribution of labor or capital by the parties to it, and it exists and is enforced under principles which recognize perfect union and equality of enjoyment of gains, and the division thereof, regardless of all inequalities induced by accident, misfortune, disease, idleness, or even wasteful habits of one or the other of the spouses. Such was the attribute assigned to the system by the Spanish civil law. . . . We have adopted this civil-law rule as it applies to the marital relation, ingrafting it upon our common-law contract of marriage, which, as we have shown, recognizes no second contract of that character, nor conjugal relation with other persons during the continuance of the lawful marriage, unless the relation is lawfully dissolved. In adopting the community system, as it may be termed for convenience of expression, neither the civil law governing the subject of marriage nor the entire system of acquests and gains was made a part of our law. The enactments which regulate the subject in this State are specific and definite statutory rules, and the civil law is not incorporated with them, nor is it further accepted than as it may have been enacted in the statute. Therefore, the qualifications and modifications of the operation of the community system in civil-law States, as Louisiana, or in civil-law countries, or those under civil-law jurisdiction, as Spain, France, and Texas as it once was, will not have application in determining how far marital rights to property claimed under a marriage which is governed by common-law principles, will be affected by a second or putative marriage recognized as valid under the civil law.”<sup>1</sup> The court then referred to

<sup>1</sup> Routh v. Routh, 57 Tex. 589, 595.

some decisions made upon the civil law, showing that the terms of that law provided for the forfeiture of rights in certain cases, and continued: "In the present state of our decisions, therefore, it may be concluded that there has not, as yet, been laid down a rule whereby to determine the limits within which the wife is secure against the forfeiture, by her fault or misconduct, of her statutory right to a share in the community. Her *status* as wife is fixed; the right of property she acquires, the duties and disabilities imposed upon her by the marriage, are precisely defined, but neither by dicta nor decision has it yet been determined what acts, facts, or circumstances, while the duties, disabilities, and burthens of the contract still attach to her, shall divorce her from the rights of property she acquired by the same contract. The facts of this case do not require us to establish that important boundary line in the separation of these important rights more definitely, if it should be drawn, than to determine the question in a negative form, without attempting to prescribe a rule or principle for the entire subject under other phases and facts. The principle referred to, however, is intimately associated with the case before us, and with the operation of the principle that marriage attaches to it as a sequence, the continued right of the wife to an equal interest in the community, until that right is in some mode recognized by the law forfeited; and with the unquestionable proposition that the existence merely of cause for divorce does not necessarily impair her marital rights to property; which rights coexist with the contract of marriage—a part of its essence—irrespective of any mere balance sheet to be struck between herself and her husband on account of their respective moral or conjugal merits or demerits, or that would show as a debit against her, that her husband may have had just grounds, which he had never legally asserted, for terminating by law his relations with her. Slight reflection even is sufficient to suggest the difficulties that would attend the efforts of courts to establish, on consistent and

harmonious principles, rules to forfeit for causes of divorce, and for delinquencies to matrimonial obligations, marital rights of property without encroachment upon the province of the lawmaking power; and also without being involved in the most serious embarrassment in resting them upon any other than their own arbitrary selection of the particular circumstances under which they should be applied: The varying course of uncongenial married life, its bickerings, quarrels, wrongs, sometimes mutually suffered, its condonations and fresh ruptures and recurring returns to mutual respect and love, when employed as a basis and standard to regulate the rights of the parties in the financial branch of their partnership, presents a medley of incongruous elements from which no legal or equitable rule could be applied, consistent with either the policy of the law governing the domestic relation of husband and wife, or the relative rights of both of the parties to property under our community system."<sup>1</sup> Hence, where a person separated from a second wife without a decree of divorce, and removed to Texas with the children of his first marriage, where he was married a third time to one who did not know that he had a wife then living, and subsequently acquired real estate in Texas, it was held in a suit after his death between the second wife and a child of the first marriage, that the separation did not operate as a forfeiture of her right as a party to the community to the such subsequently acquired land.<sup>2</sup>

<sup>1</sup> *Routh v. Routh*, 57 Tex. 589, 597.

<sup>2</sup> *Routh v. Routh*, 57 Tex. 589. "Their voluntary separation and living apart," said the court, "did not have the effect to forfeit her marital rights in the community of gains; nor did his causes of complaint against her on account of her temper, language, and treatment of his children, add any legal force to the fact that they caused him to abandon her. 'The law wisely refuses,' said Judge Porter, in *Cole's Wife v. His Heirs*, 7 Martin, N. S., 49, 18 Am. Dec. 241, 'any legal effect to a voluntary separation of those who are bound by the most solemn obligations to live together.' And in the case referred to, where the husband acquired all the property in New Orleans, during a voluntary separation of several years preceding his death, she living in New York, and never having

**§ 875. Gift in compensation for services.**—A gift made to one of the parties to the marriage is the separate property of the party to whom it is made, and the fact that the gift is made to the wife in compensation for services ren-

been in the State of Louisiana, she was held to be entitled to her equal one-half interest. When Jonathan Routh established himself in Texas, his domicile became that of the wife for *all* the purposes of her beneficial interest under the circumstances of their separation. In *Cole's Wife v. His Heirs*, 7 Martin, N. S., 49, 18 Am. Dec. 241, the able jurist who delivered the opinion showed that the writers on the civil law, where the community system prevails, who treat on the subject, all lay it down that the residence of the parties in different places will not prevent the community from existing. That the separation referred to by them, which terminates the community interest, is a legal one, and that a judicial sentence is necessary to destroy the community." In *Newland v. Holland*, 45 Tex. 588, Mr. Justice Moore, in delivering the opinion of the court, says: "That a wife who voluntarily and without any just and reasonable cause, abandons and separates herself from her husband, and continues, in wanton disregard of her duties as a wife, to live separate and apart from him at the time of his death, is estopped and precluded from claiming the homestead rights given by the constitution and statutes to the surviving wife, is not now an open question in this court. See *Sears v. Sears*, 45 Tex. 557, decided at a former day of this term, and the cases there cited. But it by no means follows that the court can hold that by so doing she also forfeits her entire interest in the community estate, or the distributive share of the separate property of her deceased husband, given her by the statute. The homestead is intended for the comfort and security of the family, and for like considerations its rights and privileges are extended to and conferred upon the family of the decedent after his death, so long as any constituent of it remains. But it is only when there is a family, or some remaining constituent of the family surviving him, that the rights and privileges of the homestead subsist or are recognized by law. Unquestionably, when the wife has voluntarily and without cause, withdrawn from and destroyed the family, ceased to be a member of it, it would be mockery to say that she is reunited to or become again a member of it by the death of her husband, or can claim privileges and immunities which by law are only given to the family or some surviving constituent of it. But the right of the surviving wife to her interest in the community property, or her distributive portion of the separate estate of her deceased husband, grows out of and depends upon the existence of the marital relation between the parties, and not merely upon continued existence of the family. It may be that by the separation the community interest in future gains will cease; but certainly it does not work a forfeiture in such as have been previously acquired. And the mere withdrawal of the wife from the husband and continuance to live separate and apart from him, however unjustifiable and improper her doing so may be, does not operate and cannot be

dered by her to the donor, does not change its character as separate property. The husband has no greater power over property conveyed to the wife, under these circumstances, than he has over any other separate property belonging to her.<sup>1</sup> The court, after considering the rules of the civil law as to donations, observed: "It is also quite evident that it is entirely consistent with the nature of a title by 'donation,' that the donor may be moved by reason of services rendered by the donee to make the donation, and that it is induced by such consideration does not take from the transaction the character of 'a donation.'"<sup>2</sup>

**§ 876. Rebuttal of presumption of community property.**—The presumption that property conveyed to one of the parties to the marriage for a pecuniary consideration is community property, may be rebutted by showing that the purchase money was the separate property of the one to whom the deed is made.<sup>3</sup> Evidence may be received for the purpose of showing from what source the consideration proceeded, on the same principle that permits the introduction of evidence to show that a deed absolute on its face is a mortgage, or to show that although the deed is made to one person the consideration was in fact paid by another. Neither party to the marriage is estopped from

treated as tantamount to a severance of the marital relation. Though the husband may have good cause for annulling the marriage, evidently, unless he chooses to do this, the mere improper and wrongful withdrawal by the wife, and her living apart from him, cannot have this effect. And if he does not choose by his will to deprive her of the distributive interest in his separate estate, which the statute gives her in the absence of any testamentary disposition of his property by her husband, it is not conceived that the court has any power to do so." See, as to the effect of a second and putative marriage under the Spanish law, while the parties to the first were still living, and the marriage had not been dissolved, *Smith v. Smith*, 1 Tex. 621; 46 Am. Dec. 121; *Lee v. Smith*, 18 Tex. 145; *Nichols v. Stewart*, 15 Tex. 233.

<sup>1</sup> *Fisk v. Flores*, 43 Tex. 340.

<sup>2</sup> *Fisk v. Flores*, 43 Tex. 340, 433, per Moore, J.

<sup>3</sup> *Ramsdell v. Fuller*, 28 Cal. 37; 87 Am. Dec. 103; *Woods v. Whitney*, 42 Cal. 358; *Ingersoll v. Truebody*, 40 Cal. 612; *Smith v. Boquet*, 27 Tex. 512; *Peck v. Brummagim*, 31 Cal. 441; 89 Am. Dec. 195.

showing, as against the other, the facts connected with the transaction, or from showing that the grantee did not pay the consideration from his or her separate funds, and between them, or between one of them and the heirs of the other, no questions involving the doctrine of notice can be mooted.<sup>1</sup>

§ 877. **Presumption when deed is made to wife.** As to the presumption that should prevail where a deed is made to the wife, and the rights of third persons are concerned, the courts are not agreed. In California, the rule is, that if the deed is made to the wife, the record gives notice to all the world that the property may be the separate property of the wife. This fact is sufficient to put subsequent purchasers upon inquiry, and if they purchase the property from the husband they do so at their peril.<sup>2</sup> On this point, Mr. Justice Sawyer said that the deed in question was sufficient in law to convey a title to the wife, but whether by it the estate became separate or community property, depended upon a fact *dehors* the deed, although ostensibly the intent was to vest the title in her. The justice proceeded to say: "It did not appear on the face of the deed that the grantee was a married woman, or that being a married woman, the consideration was paid out of her separate estate. The deed, then, so far as shown on its face, might have conveyed a title absolute to a *feme sole*, a separate estate to a *feme covert*, or an estate in common to both husband and wife. Upon the best view for plaintiff, the deed upon its face was equivocal. But it afforded to all persons seeking to acquire title under it a clue to the title, which they were bound to pursue, or suffer the consequences of their laches. The grantee is a woman. The presumption of law is, that she is sole, and *prima facie* a conveyance from her would pass the title. But she may be married, and her deed may not pass the title. The fact as to whether she

<sup>1</sup> *Peck v. Brummagin*, 31 Cal. 440; 89 Am. Dec. 195.

<sup>2</sup> *Ramsdell v. Fuller*, 28 Cal. 37; 87 Am. Dec. 103.



is married or single, all parties dealing with the land must ascertain, or omit to do so at their peril. So, also, if a grantee of a conveyance for a money consideration is a married woman at the date of the conveyance, *prima facie* a conveyance by the husband, in his own name, of the land so conveyed to the wife will be presumed to pass the title; but in fact it may not, for the reason that the land may still be the separate property of the wife, which he has no power to convey. And in such cases, as in the case last mentioned, all parties claiming title through the husband to lands, the title to which never stood in his name, must ascertain at their peril, whether he did in fact have the power to convey.”<sup>1</sup>

§ 878. **The rule in Texas.**—The question considered in the preceding section has been before the court in Texas, and a conclusion has in that State been reached, at variance with the rule prevailing in California. In one case in that State, Mr. Justice Moore said: “Our whole system of marital rights is based upon the fact that acquisitions, either of the joint or separate labor or industry of the husband or wife, become common property, and, as a general rule deducible from this principle, all property acquired by purchase or apparent onerous title, whether the conveyance be in the name of the husband or of the wife, or in the names of both, is *prima facie* presumed to belong to the community. It is true that it is now a well-established and long-recognized rule of procedure in our judicial system, as between the parties to such deeds, their privies in blood, purchasers without value or with notice, to affect the legal import of such deeds by parol evidence. But we know of no principle upon which such evidence can be received for the purpose of explaining or modifying such deeds, after the property has passed into the hands of innocent purchasers, and thereby ingrafting

<sup>1</sup> Ramsdell v. Fuller, 28 Cal. 43; 87 Am. Dec. 103. See, also, Peck v. Vandenberg, 30 Cal. 36; Metcalf v. Clark, 8 La. Ann. 287; Dominguez v. Lee, 17 La. 295; Gonor v. Gonor, 11 Rob. (La.) 526.

upon it a trust to their detriment. Such a doctrine would go far to destroy the utility of written evidences of title to land, and the registration of conveyances for the purpose of notice. . . . The statute authorizes the husband, during its continuance, to dispose of all community property. That the title of it, when acquired by the community, was taken in the name of the wife, imposes no additional burthen upon the purchaser of inquiring as to the equities of the husband and wife in respect to it.”<sup>1</sup> In a later case in the same State, the court says that the case last cited was decided “on the ground that the purchaser from the husband, of land acquired during marriage, by deed of bargain and sale taken in the name of the wife, is not thereby put upon inquiry as to any equity she may have in respect to it, but is justified and protected, if he innocently buys it as community property. The decision was not placed on the ground that it was inadmissible to prove a different consideration than that recited in the deed, but upon the broad ground that the deed could not be modified by evidence in ingrafting on it a trust to the detriment of an innocent purchaser. It is scarcely necessary to say, that if there were any recitals in the deed showing that the consideration was the wife’s separate estate, or that the conveyance was designed to be for her separate benefit, the rule would be different.”<sup>2</sup> In another case the court referred to the rule prevailing in that State, that a purchaser is not compelled to inquire what equities exist between husband and wife, where a deed expressing a valuable consideration conveys land to a married woman, and said it could see no reason why the same principle should not apply to sales made by the husband after the death of the wife.<sup>3</sup> In Texas, a judgment creditor who purchases at the execution sale is considered a *bona fide* purchaser. Hence,

<sup>1</sup> *Cooke v. Bremond*, 27 Tex. 457; 86 Am. Dec. 626.

<sup>2</sup> *Kirk v. Navigation Co.*, 49 Tex. 213, 215, per Gould, J.

<sup>3</sup> *French v. Strumberg*, 52 Tex. 92. See *Veramendi v. Hutchins*, 48 Tex. 531.

under the rule just considered, he has no notice that property purchased by him at such sale was the separate property of the wife, from the fact that the deed was made to her.<sup>1</sup>

**§ 879. Purchase on credit.**—The circumstance that land is bought on credit does not affect its character as separate or community property. A husband bought land on credit and subsequently paid a portion of the purchase price with property of his separate estate, and for the purpose of securing the remainder, he and his wife joined in a note and executed a joint mortgage on the property purchased. He subsequently sold a part of the land at a price yielding him a profit, and with a part of the proceeds derived from such sale, paid the note, and with a sum composed of the balance and some of his separate property, built a house on the part of the land remaining unsold. Such land and the building thereon, it was decided, were to be considered the separate property of the husband.<sup>2</sup>

**§ 880. Tortious possession and deed in consideration of surrender thereof.**—A party before his marriage was in possession of a tract of land without any right to hold such possession. After his marriage he executed a deed, and surrendered possession of a part of the land to those lawfully entitled to it. In consideration of this fact, the owners of the land conveyed to him a portion of it. The court decided that the land thus acquired by the husband was community property.<sup>3</sup> Mr. Justice McKinstry said: "It is true that a possession of lands may, under some circumstances, constitute property. But as between the sole and exclusive owner of a tract, and one who has intruded himself into the possession without right, how can the latter be said to have any *property* in the lands? The owners who conveyed to the defendant their title may

<sup>1</sup> Wallace v. Campbell, 54 Tex. 87.

<sup>2</sup> Martin v. Martin, 52 Cal. 235.

<sup>3</sup> Pancoast v. Pancoast, 57 Cal. 820.

have been induced to make the conveyance to save themselves the annoyance and expense of litigation, which, however, could only have resulted in a judgment in their favor. The interchange of deeds did not necessarily involve a recognition by the owners of both tracts of land of any estate in defendant. The ability of defendant to give trouble, and cause expense to those who held the Peralta title, by withholding from them the possession for a time, at the cost of a judgment against him for restitution (including costs of suit, and perhaps mesne profits), cannot be termed *property* in any legal sense. This is not the case of separate property acquired by one of the parties to the marriage contract prior to the marriage, and which has simply changed its *form* after marriage. Defendant had no right in or to the land before his marriage; his tortious possession could give him none after marriage.”<sup>1</sup>

<sup>1</sup> In *Pancoast v. Pancoast*, 57 Cal. 320.

## CHAPTER XXVI.

### COVENANTS.

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§ 881. **Covenants.**—Covenants in deeds are those clauses or agreements whereby one party stipulates that certain facts are true, or obligates himself to perform or

forbear doing something to or for the other.<sup>1</sup> "A covenant may be defined to be an agreement between two or more parties, reduced to writing, and executed by a sealing and delivery thereof, whereby some of the parties named therein, or one of them, engages with the other or others, or some of them, therein also named, that some act hath or hath not already been done, or for the performance or nonperformance of some specified duty."<sup>2</sup> They may be either express or implied.<sup>3</sup> If land is conveyed as bounded upon one or more sides by a way, this is not a description merely, but an implied covenant of the existence of such a way. "It probably entered much into the consideration of the purchase," said the court, "that the lot fronted upon two ways which would be always kept open, and, indeed, could never be shut without a right to damages in the grantee or his assigns."<sup>4</sup>

§ 882. **Construction.**—The rule in construing covenants is to construe them most strictly against the covenantor and most favorably to the covenantee.<sup>5</sup> But as a covenant is a part of a deed, it is subject to the same construction as the deed itself, and should receive such a construction as will effectuate the actual intent of the parties.<sup>6</sup> A penalty annexed to a covenant for its non-

<sup>1</sup> 2 Blackst. Com. 304; Bacon Abr. tit. Evidence.

<sup>2</sup> *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. 68; 33 Am. Dec. 38. And see *Randel v. Chesapeake etc. Canal Co.*, 1 Har. (Del.) 233; *Greenleaf v. Allen*, 127 Mass. 248. Equity will enforce against the grantees of the original covenantor, a covenant to use, or abstain from using, the land in such manner as the original covenantee may specify: *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816.

<sup>3</sup> *Taylor v. Hopper*, 62 N. Y. 649; *Parker v. Smith*, 17 Mass. 413; 9 Am. Dec. 157; *Emerson v. Wiley*, 10 Pick. 310; *Frey v. Johnson*, 22 How. Pr. 323.

<sup>4</sup> *Parker v. Smith*, 17 Mass. 413; 9 Am. Dec. 157.

<sup>5</sup> *Warde v. Warde*, 16 Beav. 103; *Randel v. Chesapeake etc. Canal Co.*, 1 Har. (Del.) 154; *Hookes v. Swain*, Lev. 102; *Gifford v. First Pres. Soc.* 56 Barb. 114.

<sup>6</sup> *Schoenberger v. Hoy*, 40 Pa. St. 132; *Watchman v. Crook*, 5 Gill & J. 239; *Ludlow v. McCrea*, 17 Wend. 228; *Marvin v. Stone*, 2 Cowen, 781. See *Burk v. Burk*, 64 Ga. 632. In construing a covenant, the intention of the parties should not be gathered by reading a single clause, but by



performance is, where the primary intent is that the covenant shall be performed, regarded merely as a security. It is not a substitute for the covenant, and it is immaterial that such a covenant follows the *habendum* clause, while the use in other respects of the property conveyed is restrained by other covenants.<sup>1</sup> Reference in a deed, for the purpose of aiding its description, to another deed which is declared to be subject to a mortgage, does not qualify the covenants in the first deed, as such reference is for the purpose of describing the land and not the title.<sup>2</sup> "The general rule should be carefully observed, that covenants are to be construed, as nearly as possible, by the obvious intentions of the parties, which must be gathered from the whole context of the instrument, interpreted according to the reasonable sense of the words."<sup>3</sup> A covenant was in this form: "The said parties of the first part, for themselves, heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, have not heretofore done, committed, or wittingly or willingly suffered to be done or committed, any act, matter, or thing whatsoever, whereby the premises hereby granted, or any part thereof, is, are, or shall or may be charged, encumbered in title, or estate, or otherwise." The court held it to be a covenant, for a breach of which, at any time in the future, damages might be recovered.<sup>4</sup>

§ 883. **How created.**—A covenant may be created by any language showing the intention of the parties to

the whole context, and, in case of a doubt in the meaning, by considering those surrounding circumstances as the parties are supposed to have considered when their minds agreed: *Clark v. Devoe*, 124 N. Y. 120; 21 Am. St. Rep. 652.

<sup>1</sup> *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400. In this case the covenant was not to erect any building adjoining certain premises which depended for air and light on the land conveyed.

<sup>2</sup> *Powers v. Patten*, 71 Me. 583.

<sup>3</sup> *Wadlington v. Hill*, 18 Miss. (10 Smedes & M.) 560, 562.

<sup>4</sup> *Post v. Campau*, 42 Mich. 91.

bind themselves. No particular form is required,<sup>1</sup> nor is it necessary to use any particular word. A covenant may be created without using the word "covenant" in the clause containing the stipulation.<sup>2</sup> A covenant may be contained in a recital in the deed, and be as operative as though it was expressed with the other covenants.<sup>3</sup> As it is a promise, the question is what was the understanding of the parties. A single sentence may contain several covenants.<sup>4</sup> Where a circuitry of action would arise from mutual deeds, otherwise making the parties thereto liable to each other upon similar covenants relating to the same encumbrance, they will be construed as mutually satisfying each other.<sup>5</sup> A covenant of title should be taken in connection with the terms of the conveyance.<sup>6</sup> The covenants may extend to equitable as well as to legal claims.<sup>7</sup> But it is held in a deed conveying the legal title, that the existence of an equitable title in another arising from a parol agreement for a conveyance, is not a breach of any of the usual covenants.<sup>8</sup>

§ 884. **Covenants usually found in deeds.**—It is not intended to give the practice in the different States and England concerning the insertion of covenants in deeds, or to discuss at length what is understood by an agreement to give a deed with the "usual covenants." While in some places it is customary to give a deed with full covenants, in others a demand for a deed of this character would, from the infrequency with which a conveyance of this kind is given, be considered as implying a

<sup>1</sup> *Marshall v. Craig*, 1 Bibb, 379; 4 Am. Dec. 647; *Sampson v. Esterby*, 9 Barn. & C. 505; *Rigby v. Great Western Ry.* 14 Mees. & W. 811; *Jackson v. Swart*, 20 Johns. 85.

<sup>2</sup> *Bull v. Follett*, 5 Cowen, 170; *Kendall v. Talbot*, 2 Bibb, 614; *Randel v. Chesapeake etc. Canal Co.* 1 Har. (Del.) 151.

<sup>3</sup> *Horry v. Frost*, 10 Rich. Eq. 109; *De Forest v. Byrne*, 1 Hilt. 43.

<sup>4</sup> *Johnson v. Hollensworth*, 48 Mich. 140.

<sup>5</sup> *Silverman v. Loomis*, 104 Ill. 137.

<sup>6</sup> *Hall v. Scott County*, 2 McCrary C. C. 356.

<sup>7</sup> *Dugger v. Oglesby*, 99 Ill. 405.

<sup>8</sup> *Wilson v. Irish*, 57 Iowa, 184.

doubt concerning the validity of the owner's title. The covenants in general use may be enumerated as those of seisin, right to convey, against encumbrances, for quiet enjoyment, further assurance, and warranty. In California, the Civil Code provides that "an agreement on the part of the seller of real property to give the usual covenants binds him to insert in the grant covenants of 'seisin,' 'quiet enjoyment,' 'further assurance,' 'general warranty,' and 'against encumbrances.'"<sup>1</sup> "Covenants for

<sup>1</sup> Civil Code Cal. § 1733. Mr. Washburn, in his treatise on Real Property, vol. 8 (4th ed.), 448, says: "The three covenants ordinarily found in deeds of conveyance in the Eastern States are those contained in the form of a deed heretofore given, namely, of seisin, the right to convey, against encumbrances, and of warranty. In the English deeds there is a covenant for further assurance, which is also found in deeds in use in some of the Middle States, and a covenant of quiet enjoyment. It is said that the covenant of seisin is not in use now in England, being embraced in that of a right to convey; while in the Western States, Pennsylvania, and the Southern States, the covenant of warranty is not infrequently the only covenant inserted. In Iowa, a covenant of warranty is held to embrace the whole three above mentioned. It is said that covenants for further assurance are not in general use in this country. In Ohio, the usual covenants are of seisin and warranty": Citing Williams Real Prop. 69, and Rawle's note; Caldwell v. Kirkpatrick, 6 Ala. 60; 41 Am. Dec. 36; Van Wagner v. Van Nostrand, 19 Iowa, 426; Foote v. Burnet, 10 Ohio, 317, 329; 36 Am. Dec. 90; Armstrong v. Darby, 26 Mo. 517; Walk. Am. Law, 382.

Mr. Rawle says: "To a layman it would seem plain that if one were to undertake to convey an estate in fee simple, which he professed to hold in his own right, and not fiduciarily, he must himself be seised of such an estate; and yet, until recently, it was a common practice of conveyancing in England, for the purpose of saving the expense upon a resale, of levying a fine whereby to bar the dower of the wife, to cause property upon its purchase to be conveyed to such uses as the purchaser should appoint, and, in default of appointment, to the use of the purchaser and his heirs. And it has been, perhaps, owing to this custom that the covenant for seisin has been for more than half a century generally omitted in England, and in its place substituted the covenant for good right to convey. And although, by a recent act of Parliament, the estate of the wife is now passed, as with us, by a simple separate acknowledgment, yet it seems to be customary, in the most modern conveyancing, to omit the covenant for seisin. The usual covenants, then, in the case of a sale, are those of good right to convey, for quiet enjoyment, against encumbrances, and for further assurance. . . . As to those upon this side of the Atlantic, of course the local habit and usage varies not only more or less widely between the different States, but

title are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and the covenantee the benefit of the title which the grantor and covenantor professes to convey. Those in common use are five in number in England—of seisin, of right to convey, for quiet enjoyment, against encumbrances, and for further assurance—and are held to run with the land. In the United States, there is, in addition, a covenant of warranty, which is now more commonly used than any of the others.”<sup>1</sup>

§ 885. **Covenant for seisin.**—This covenant is generally expressed by the clause “that the said grantor is lawfully seised,” or “has a good and sufficient seisin.” The word “seisin” has different significations. It may mean actual possession, or as it is frequently termed, “seisin in deed.” There is also a constructive seisin, exemplified by the case of a tenant for years, whose possession is also the possession of the owner of the reversion. There is also a seisin in law when a person not actually in possession is deemed to be seised of the estate, as in the case of an heir who has not entered into possession of land acquired by descent. On account of the various meanings attached to the word “seisin,” a covenant of this kind is not always given the same construction. In England, a covenant for seisin is a covenant for the title, and imports that the grantor is seised of the title.<sup>1</sup> This rule also prevails in most of the States.<sup>2</sup>

sometimes, indeed, between different parts of the same State; but it may, perhaps, in general be said that what are here often called ‘full covenants’ are the covenants for seisin, for right to convey, against encumbrances, for quiet enjoyment, sometimes for further assurance, and, almost always, of warranty—this last often taking the place of the covenant for quiet enjoyment”: Rawle on Covenants (4th ed.), 24, 27.

<sup>1</sup> Bouv. Law Dict. tit. Covenant.

<sup>2</sup> *Cooke v. Fowns*, 1 Keb. 95; *Gray v. Briscoe*, Noy, 142; *Young v. Raincock*, 7 Com. B. 310; *Howell v. Richards*, 11 East, 641; Rawle on Covenants, 56.

<sup>3</sup> *Richardson v. Dorr*, 5 Vt. 21; *Catlin v. Hurlburt*, 3 Vt. 407; *Mills v. Catlin*, 22 Vt. 106; *Lockwood v. Sturdevant*, 6 Conn. 385; *Parker v. Brown*, 15 N. H. 186, overruling *Willard v. Twitchell*, 1 N. H. 178; *Breck v. Young*,

§ 886. **Different rule.**—But in other States, as in Massachusetts, Maine, and, to a certain extent, in Ohio and Illinois, a different rule prevails. In those States a covenant of good and sufficient seisin does not require

11 N. H. 491; *Pringle v. Witten*, 1 Bay, 256; 1 Am. Dec. 612; *Kincaid v. Brittain*, 5 Sneed, 119; *Pollard v. Dwight*, 4 Cranch, 430; *McCarty v. Leggett*, 3 Hill, 134; *Greenby v. Wilcocks*, 2 Johns. 1; 3 Am. Dec. 379; *Brandt v. Foster*, 5 Clarke, 287; *Mott v. Palmer*, 1 Comst. 564; *Morris v. Phelps*, 5 Johns. 49; 4 Am. Dec. 323; *Abbott v. Allen*, 14 Johns. 248; *Fitch v. Baldwin*, 17 Johns. 161; *Fitzhugh v. Oroghan*, 2 Marsh. J. J. 430; 19 Am. Dec. 140; *Coit v. McReynolds*, 2 Rob. (N. Y.) 655; *Hastings v. Webber*, 2 Vt. 407; *Martin v. Baker*, 5 Blackf. 232; *Thomas v. Perry*, 1 Peters C. C. 57; *Woods v. North*, 6 Humph. 309; 44 Am. Dec. 312; *Clapp v. Herdman*, 25 Ill. App. 509; *Resser v. Carney*, 52 Minn. 397; 54 N. W. Rep. 89; *Trice v. Kayton*, 84 Va. 217; 10 Am. St. Rep. 836; 4 S. E. Rep. 377; *Zent v. Picken*, 54 Iowa, 535; 6 N. W. Rep. 750; *Moore v. Johnston*, 87 Ala. 220. See *Lindsey v. Veasy*, 62 Ala. 421; *Matteson v. Vaughn*, 38 Mich. 373. In *Parker v. Brown*, 15 N. H. 186, Parker, C. J., who delivered the opinion of the court, said: "Parties not conversant with the law ordinarily understand this covenant as an assurance of a title, and we are of the opinion that they have a right so to understand it. A party who has disseised another may be treated as seised of the fee at the election of his disseisee. He cannot be permitted to qualify his own wrong; but this is for the sake of the remedy. A party who remains in the adverse, peaceable possession of lands for twenty years, as owner, may thereby have evidence of a seisin in fee during that time. But this is for a quieting of possession and barring State claims. It does not show that, before the lapse of the period prescribed, he had a lawful seisin in fee; on the contrary, he was, until the expiration of the period, a wrongdoer."

In *Catlin v. Hurlburt*, 3 Vt. 407, Hutchinson, C. J., in delivering the opinion of the court, said, with reference to a covenant that the grantors were seised of the land in fee simple, and had in themselves good right to bargain and sell the same in the manner mentioned in the deed: "These expressions, and those of similar import, have always been considered in this State as amounting to a covenant of title. They have been inserted that they should be so considered. It is argued, however, that this means nothing more than that the grantors were in possession, claiming to hold in fee simple. This alteration might as well be incorporated by construction in all the covenants that decidedly relate to title in the whole deed. That they were well seised in fee simple means that they were actually in possession, claiming to hold in fee simple. That they had good right to sell and convey, means that they claim to have such right. That the premises are free from all encumbrances, means that they claim that they are thus free. This is not the most natural and obvious meaning of the usual expressions in deeds of warranty. They say nothing about claiming. They speak of realities. Fee simple denotes a permanent estate."

that the grantor shall have a perfect title, but it is sufficient if he have an actual seisin under a color of title, no matter how tortious his possession may be.<sup>1</sup> These latter decisions are probably based upon the ground that a covenant for seisin is simply an assurance that the grantor had such possession as would render his conveyance unaffected by the champerty acts; that is, his deed was not that of a disseisee. "It is probable that the covenant for seisin was anciently introduced into deeds to guard against such an adverse possession as would render the deed void, as would have been the case at common law, and is now the case by virtue of our statute, if there be adverse possession."<sup>2</sup>

§ 887. **Covenant of seisin of indefeasible estate.**—As we have seen, a covenant that the grantor is seised merely without further qualification, may in some States mean that he has only the actual possession. Yet everywhere the rule prevails that when the covenant is that the grantor is seised of an *indefeasible* estate, the covenant is one of title, and can be satisfied only by the possession on the part of the vendor of an indefeasible title

<sup>1</sup> *Marston v. Hobbs*, 2 Mass. 439; 3 Am. Dec. 61; *Cornell v. Jackson*, 8 Cush. 509; *Chapel v. Bull*, 17 Mass. 219; *Follett v. Grant*, 5 Allen, 175; *Wait v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391; *Raymond v. Raymond*, 10 Cush. 134; *Griffin v. Fairbrother*, 1 Fairf. 59; *Wheeler v. Hatch*, 3 Fairf. 389; *Baxter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49; *Boothby v. Hathaway*, 20 Me. 255; *Cushman v. Blanchard*, 2 Greenl. 268; 11 Am. Dec. 76; *Wilson v. Widenham*, 51 Me. 567; *Ballard v. Child*, 34 Me. 355; *Backus v. McCoy*, 3 Ohio, 211; 17 Am. Dec. 585; *Watts v. Parker*, 27 Ill. 224, 229; *Kirkendall v. Mitchell*, 3 McLean, 145; *Twambley v. Henley*, 4 Mass. 439; *Bearce v. Jackson*, 4 Mass. 408; *Scott v. Twiss*, 4 Neb. 133; *Montgomery v. Reed*, 69 Me. 510. In *Marston v. Hobbs*, *supra*, the court say: "The defendant, to maintain the issue on his part, was obliged to prove his seisin when the deed was executed. But it was not necessary to show seisin under an indefeasible title. A seisin in fact was sufficient whether he gained it by his own disseisin, or whether he was in under a disseisin. If at the time he executed his deed he had the exclusive possession of the premises, claiming the same in fee simple, by a title adverse to the owner, he was seised in fee and had a right to convey."

<sup>2</sup> *Catlin v. Hurlburt*, 3 Vt. 407, per Hutchinson, C. J. And see *Triplett v. Gill*, 7 Marsh. J. J. 436; *Pierce v. Johnson*, 4 Vt. 253.

to the land conveyed.<sup>1</sup> Of this covenant, Mr. Washburn says that the effect of this covenant in this country, "when expressly made, is uniformly held to extend further than that of the ordinary covenant of seisin, and to cover an existing outstanding title adverse to that of the grantor. It is intended to meet the case where one is in possession and his grantee wishes for a remedy, if he shall discover that a third person has a better title, which for any reason he does not see fit to enforce by eviction, so as to lay a foundation for an action by the grantee upon his covenant of warranty."<sup>2</sup>

**§ 888. By what the covenant of seisin is broken.**—A covenant of seisin is broken if there is no such land in existence as that described in the deed or purporting to have been conveyed.<sup>3</sup> Where a spring had been previously conveyed, it was held, on the ground that the spring was a part of the land conveyed, the covenant of seisin in the deed had been broken.<sup>4</sup> So it is broken where there is a paramount right in another to prevent the grantee from damming water to a certain height, when there is a reservation of that right to him in his deed.<sup>5</sup> It is also broken if the grantor possesses only an estate tail,<sup>6</sup> or if an estate for life is outstanding.<sup>7</sup> If the grantor has previously sold any part of the premises which is a fixture, such as the rails of a fence, buildings, or other structures, so that the right to remove them is vested in another at the time of his conveyance, his covenant of seisin is

<sup>1</sup> *Raymond v. Raymond*, 10 Cush. 134; *Collier v. Gamble*, 10 Mo. 472; *Smith v. Strong*, 14 Pick. 132; *Garfield v. Williams*, 2 Vt. 328; *Prescott v. Trueman*, 4 Mass. 631; 3 Am. Dec. 246; *Pierce v. Johnson*, 4 Vt. 253; *Abbott v. Allen*, 14 Johns. 252; *Bender v. Fromberger*, 4 Dall. 436, 439.

<sup>2</sup> 3 Wash. Real Prop. (4th ed.) 456.

<sup>3</sup> *Bacon v. Lincoln*, 4 Cush. 212; 50 Am. Dec. 765; *Basford v. Pearson*, 9 Allen, 389; 85 Am. Dec. 764; *Wheelock v. Thayer*, 16 Pick. 68.

<sup>4</sup> *Clark v. Conroe*, 38 Vt. 471.

<sup>5</sup> *Walker v. Wilson*, 18 Wis. 522; *Traster v. Snelson*, 29 Ind. 96; *Hall v. Gale*, 14 Wis. 55.

<sup>6</sup> *Comstock v. Comstock*, 23 Conn. 352.

<sup>7</sup> *Wilder v. Ireland*, 8 Jones (N. C.), 90; *Mills v. Catlin*, 22 Vt. 106.



broken.<sup>1</sup> The use by a railway company of a parcel of land as a right of way is not of itself a breach. It must also appear that the company had a valid right to such use of the land.<sup>2</sup> If the grantor covenants that he is seised of an undivided portion of certain land, his covenant is broken if the fact be that a partition had been made.<sup>3</sup> So, where there are two tenants, and one of them attempts to convey the entire estate, the covenant is broken as to one-half of the estate.<sup>4</sup> It is broken by the existence of a prior deed conveying to a railroad company and its assigns a strip of land along the line of its road for the purposes of the company, where a deed is subsequently executed conveying a parcel of land including such strip, notwithstanding the fact that at the time of the execution of the second deed, the strip of land is occupied for the purposes of a railroad.<sup>5</sup>

**§ 889. Broken at once if grantor has no possession.** Unless there is some statutory regulation to the contrary, the rule is that a covenant of seisin, where the grantor has no possession, either actual or constructive, is broken as soon as made. If he has no possession, either by himself or by another, nothing is conveyed by his deed where champerty acts prevail.<sup>6</sup>

**§ 890. By what the covenant is not broken.**—This covenant is not broken by the existence of a highway over a portion of the land,<sup>7</sup> nor is it broken by the existence of a railroad across the land, but a covenant

<sup>1</sup> *West v. Stewart*, 7 Barr. 122; *Powers v. Dennison*, 30 Vt. 752; *Van Wagner v. Van Nostrand*, 19 Iowa, 427. See *Burke v. Nichols*, 2 Keyes, 671; *Abbott v. Rowan*, 33 Ark. 593; *Benton County v. Rutherford*, 33 Ark. 640.

<sup>2</sup> *Jerald v. Elly*, 51 Iowa, 321.

<sup>3</sup> *Morrison v. McArthur*, 43 Me. 567.

<sup>4</sup> *Downer v. Smith*, 38 Vt. 464.

<sup>5</sup> *Messer v. Oestreich*, 52 Wis. 684.

<sup>6</sup> See *Reasoner v. Edmondson*, 5 Ind. 393; *Fowler v. Poling*, 2 Barb. 303; *Oushman v. Blanchard*, 2 Me. 269; 11 Am. Dec. 76; *Wilson v. Cochran*, 46 Pa. St. 231; 3 Wash. Real Prop. (4th ed.) 457.

<sup>7</sup> *Whitbeck v. Cook*, 15 Johns. 483; 8 Am. Dec. 272; *Vaughn v. Stuzaker*, 16 Ind. 340.

against encumbrances would be.<sup>1</sup> A judgment, mortgage, or a right of dower does not operate as a breach of the covenant of seisin.<sup>2</sup> All of these do not affect the technical seisin of the grantee. He has the title by virtue of his deed, and although these may be encumbrances from which he may be protected by his covenant against encumbrances, yet they do not affect his possession of the land or his legal title thereto. Thus, a mortgage is a charge upon the land, but until the mortgagee enters, the covenant of seisin is not broken.<sup>3</sup> Where a deed conveys land, excepting "eighty acres more or less heretofore conveyed," to another, such clause is descriptive merely. It is not of the essence of the contract; hence, if the portion previously conveyed exceeds the quantity mentioned in the deed, the covenant of seisin by the grantor is not broken.<sup>4</sup> Where a purchaser from a sheriff, under a judgment of foreclosure, conveyed with a covenant of seisin, a subsequent order of the court vacating the sale and opening the judgment did not, it was held, operate as a breach of the covenant.<sup>5</sup> Where one is in possession of land under a patent, and sells it with a covenant of seisin, the fact that such patent is voidable, and hence, his title to the premises defeasible, does not render him liable on the covenant.<sup>6</sup>

<sup>1</sup> *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426.

<sup>2</sup> *Fitzhugh v. Croghan*, 2 Marsh. J. J. 430; 19 Am. Dec. 139; *Sedgwick v. Hollenbeck*, 7 Johns. 376; *Stanard v. Eldridge*, 16 Johns. 254; *Tuite v. Miller*, 10 Ohio, 383; *Massey v. Craine*, 1 McCord, 489; *Lewis v. Lewis*, 5 Rich. 12; *Reasoner v. Edmondson*, 5 Ind. 394. See *Zent v. Picken*, 54 Iowa, 535.

<sup>3</sup> *Reasoner v. Edmondson*, 5 Ind. 394. Where one of the parties was a minor, it was held that inasmuch as the title had passed to the grantee, there could be no breach of the covenant until the minor attained majority and disaffirmed, or in some legal manner avoided the conveyance: *Van Nostrand v. Wright*, Lalor's Supp. to Hill & Denio (N. Y.), 260.

<sup>4</sup> *McArthur v. Morris*, 84 N. C. 405.

<sup>5</sup> *Coit v. McReynolds*, 2 Rob. (N. Y.) 658. "Suppose a man conveys his property to an innocent party in fraud of his creditors, and the court should set aside the deed (if a court could be found to do such a thing), would an action lie by the grantee for a breach of the covenant of seisin? I think not."

<sup>6</sup> *Pollard v. Dwight*, 4 Cranch, 430, 432.

§ 891. **Seisin of grantee.**—Nor can advantage be taken of this covenant, when the grantee is himself seised of the premises. “It can never be permitted to a person to accept a deed with covenants of seisin, and then turn round upon his grantor and allege that his covenant is broken, for, that at the time he accepted the deed, he himself was seised of the premises.”<sup>1</sup> A subsequent written contract from a former owner to convey the legal estate to some one else than the grantee, is not a breach.<sup>2</sup> And this covenant is not broken by the existence of an easement.<sup>3</sup>

§ 892. **Burden of proof.**—When an action is brought by a grantee against the grantor for a breach of the covenant of seisin, the defendant has the burden of proof to show that the title he has transferred is good and valid. This rule is founded on the reason that the defendant is supposed to know the state of the title, and the plaintiff has the negative until the defendant shows affirmatively title on his part. It would follow from this rule that in the absence of evidence on either side, the plaintiff would be entitled to recover.<sup>4</sup>

§ 893. **Covenant for right to convey.**—In most cases a covenant for a right to convey is the equivalent of a covenant of seisin. But there are cases where this covenant must take the place of the latter. Wherever a conveyance is made under a power, manifestly the trustee or donee cannot execute a covenant of seisin, but he can give a covenant of equal value by inserting in his conveyance a covenant for good right to convey. Then, again, in

<sup>1</sup> *Fitch v. Baldwin*, 17 Johns. 161.

<sup>2</sup> *Seckler v. Fox*, 51 Mich. 92. Evidence is inadmissible to show, in support of such a contract, that it was executed in compliance with a prior oral agreement with the grantor to provide for such person in this mode: *Seckler v. Fox*, 51 Mich. 92.

<sup>3</sup> *Blondeau v. Sheridan*, 81 Mo. 545.

<sup>4</sup> *Abbott v. Allen*, 14 Johns. 253; *Patter v. Kitchen*, 5 Bosw. 566; *Baker v. Hunt*, 40 Ill. 266; 89 Am. Dec. 346; *Swafford v. Whipple*, 3 Greene, G. 261, 264; 54 Am. Dec. 498; *Schofield v. Iowa Co.*, 32 Iowa, 321; *Beckman v. Henn*, 17 Wis. 412; *Mechlem v. Blake*, 16 Wis. 102; 82 Am. Dec. 707.

those States where a covenant of seisin is satisfied by an actual possession, no matter how tortious it may be, without reference to the title or right to possession, it is natural that a purchaser should seek to protect himself by this covenant. Where the covenant of seisin is considered as warranting the title, as is the case in England and most of the States, the rules and limitations applicable to a covenant of seisin also apply to the covenant for right to convey, which, for practical purposes, may be considered its equivalent.<sup>1</sup>

**§ 894. Damages for breach of covenants of seisin and good right to convey.**—The measure of damages for a breach of these covenants, where the conveyance passes nothing to the grantee, is the consideration paid by the grantee, and interest on such sum.<sup>2</sup> It has frequently

<sup>1</sup> See Sugden on Vendors (13th ed.) 462; Dart on Vendors (4th ed.), 499; Rawle on Covenants (4th ed.), 87; Chapman v. Holmes, 5 Halst. 20; Bickford v. Page, 2 Mass. 455; Dunnica v. Sharp, 7 Mo. 71; Willson v. Willson, 5 Fost. (N. H.) 234; 57 Am. Dec. 320.

<sup>2</sup> Smith v. Strong, 14 Pick. 128; Bickford v. Page, 2 Mass. 455; Ela v. Card, 2 N. H. 175; 9 Am. Dec. 46; Morse v. Shattuck, 4 N. H. 229; 17 Am. Dec. 419; Greenby v. Wilcocks, 2 Johns. 1; 3 Am. Dec. 379; Farmers' Bank v. Glen, 68 N. C. 35; St. Louis v. Bissell, 46 Mo. 157; Kimball v. Bryant, 25 Minn. 496; Sumner v. Williams, 8 Mass. 162; 5 Am. Dec. 83; Stubbs v. Page, 2 Greenl. 378; Mitchel v. Hasen, 4 Conn. 495; 10 Am. Dec. 169; Foster v. Shannon, 41 N. H. 373; Phipps v. Tarpley, 31 Miss. 433; Hodges v. Thayer, 110 Mass. 286; Overhauser v. McCallister, 10 Ind. 41; Leland v. Stone, 10 Mass. 459; Marston v. Hobbs, 2 Mass. 433; 3 Am. Dec. 61; Caswell v. Wendwell, 4 Mass. 108; Wilson v. Forbes, 2 Dev. 30; Nutting v. Herbert, 35 N. H. 120; Willson v. Willson, 25 N. H. 229; 57 Am. Dec. 320; Sterling v. Peet, 14 Conn. 245; Tapley v. Lebaume, 1 Mo. 550; Campbell v. Johnston, 4 Dana, 182; Cox v. Strode, 2 Bibb. 277; 5 Am. Dec. 603; Foster v. Thompson, 41 N. H. 373; Martin v. Long, 3 Mo. 391; Lawless v. Collier, 19 Mo. 480; Blake v. Burnham, 29 Vt. 437; Recois v. Younglove, 8 Baxt. 385; Backus v. McCoy, 3 Ohio, 211; 17 Am. Dec. 585; Clark v. Parr, 14 Ohio, 118; 45 Am. Dec. 529; Nichols v. Walter 8 Mass. 243; Hacker v. Blake, 17 Ind. 97; Frazier v. Supervisors, 74 Ill. 291; Blossom v. Knox, 3 Pinn. 262; Blackwell v. Justices, 2 Blackf. 143; Logan v. Moulder, 1 Ark. 313; 33 Am. Dec. 338; Lacy v. Marnan, 37 Ind. 168; Kincaid v. Brittain, 5 Sneed, 109; Kingsbury v. Milner, 69 Ala. 502; Hacker v. Storer, 8 Me. 228; Hacker v. Blake, 17 Ind. 97; Bonta v. Miller, 1 Litt. 250; Sheets v. Andrews, 2 Blackf. 274; Kimball v. Bryant, 25 Minn. 496; Cummins v. Kennedy, 3 Litt. 118; 14 Am. Dec. 45; Moore

been contended that the vendee should be entitled to recover the value of the land at the time he is deprived of it; in other words, that he should be reimbursed for the loss he has actually sustained. But the rule is settled as stated above. Chief Justice Tilghman, in a case where it was urged that actual loss should be the criterion by which to measure the damages, said: "The rule contended for by the plaintiff's counsel, in its utmost latitude, applied to covenants like the present, would, in many instances, produce excessive mischief. Indeed, the counsel have, in some measure, given up this rule by confessing that when buildings of magnificence are erected to gratify the luxury of the wealthy, it would be unreasonable to give damages to the extent of the loss; but the ruinous consequences would not be less to many persons who have sold lands on which no other than useful buildings have been erected. The rise in the value of land, not only in towns on the sea coast, but in the interior part of the United States, is such that it can hardly be supposed that any prudent man would undertake to answer the incalculable damages which might overwhelm his family, under the construction contended for by the plaintiff. I have taken pains to ascertain the opinion of lawyers in this State prior to the American revolution, and I think myself warranted in asserting, from the information that I have received, that the prevailing opinion among the most eminent counsel was that the standard of damages was the value of the land at the time of making the contract."<sup>1</sup> To similar effect is the language of Mr. Justice Livingston, in one of the early New York cases: "To re-

*v. Frankenfield*, 25 Minn. 540; *Park v. Cheek*, 4 Cold. 20; *Rhea v. Swain*, 122 Ind. 272; *Horne v. Walton*, 117 Ill. 130; *Semple v. Whorton*, 68 Wis. 626; 32 N. W. Rep. 690; *Daggett v. Reas*, 79 Wis. 60; 48 N. W. Rep. 127; *McLennan v. Prentice*, 85 Wis. 427; 55 N. W. Rep. 764; *Bowne v. Wolcott*, 1 N. Dak. 415; 48 N. W. Rep. 336; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271; 22 S. W. Rep. 314. See *Price v. Deal*, 90 N. O. 290; *Lanigan v. Kille*, 13 Phila. 60; *Bloom v. Wolfe*, 50 Iowa, 286.

<sup>1</sup> In *Bender v. Fromberger*, 4 Dall. 442.

fund the consideration, even with interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion, where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purpose of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee? The safest general rule in all actions on contract is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also."<sup>1</sup> Where the plaintiff has had the use

<sup>1</sup> In *Staats v. Ten Eyck*, 3 Oaines, 111; 2 Am. Dec. 254. And see, also, *Pitcher v. Livingston*, 4 Johns. 1; 4 Am. Dec. 229; *Swafford v. Whipple*, 3 Greene, G. 261, 264; 54 Am. Dec. 498. In *Pitcher v. Livingston*, 4 Johns. 1, 17, Chief Justice Kent said: "The case before us then resolves itself into this question: What is the extent of the rule of damages on a breach of the covenant of seisin? Three points are submitted by the case: (1) Whether the plaintiff can recover interest on the consideration paid; (2) whether he can recover for the increased value of the land; and (3) whether he can recover for his beneficial improvements. The two first points were settled in the case of *Staats v. Ten Eyck*, and need not be again examined. Nothing has been shown which affects the accuracy of that decision on those points, and it deserves notice as being of great weight in support of that decision, that in the States of Massachusetts and Pennsylvania, the same rule of damages is established in an action for a breach of the covenant of seisin. The third point was reserved in the consideration of the former case, and no

of the premises, no interest can be recovered for the time elapsing before eviction, unless he has been forced to

opinion expressed upon it. It, therefore, remains open for discussion. I must own that I never perceived any ground for a distinction as to the damages between the rise in the value of the land and the improvements. There is no reason for such a distinction deducible from the nature of the covenant of seisin. Improvements made upon the land were never the subject matter of the contract of sale any more than its gradual increase or diminution in value. The subject of the contract was the land as it existed and was worth when the contract was made. The purchaser may have made the purchase under the expectation of a great rise in the value of the land, or of great improvements to be made by the application of his wealth or his labor. But such expectations must have been confined to one party only, and not have entered as an ingredient into the bargain. It was the land, and its price at the time of the sale, which the parties had in view, and to that subject the operation of the contract ought to be confined. The argument in favor of the value of the land and the improvements as they exist at the time of eviction, has generally excepted cases of extraordinary increase and of very expensive improvements. It seems to have been admitted, that without such a limitation to the doctrine, it could not be endured. But this destroys everything like a fixed rule on the subject, and places the question of damages in a most inconvenient and dangerous uncertainty. We have a striking illustration of this in the French law. The rule in France upon *bona fide* sales, according to Pothier, *Traité du Contrat de Vente* (No. 132-141), is to make the seller, on eviction of the buyer, refund not only the original price, but the increased value of the land, and the expense of the meliorations made. He admits, however, that the intention of the parties is to be the rule in the assessment of damages, and that, in the case of an immense augmentation in the price of the land, or in the value of the improvements, the seller is to answer only for the moderate damages which the parties could be supposed to have anticipated when the contract was made. It is plainly to be perceived that there is no certainty in such a loose application of the rule, and that it leaves the damages to an arbitrary and undefined discretion, and so it appears to have been understood; for in the '*Institution au Droit Francois*,' by M. Argou (liv. 3, c. 23), it is laid down that 'the question of damages, beyond the price paid, is with them *very arbitrary*.' This is not consonant to the genius of our law, nor does it recommend itself well for our adoption. On a subject of such general concern, and of such momentous interest, as the usual covenants in a conveyance of land, the standard for the computation of damages, upon a failure of title (whatever that standard may be), ought, at least, to be certain and notorious. The seller and the purchaser are equally interested in having the rule fixed. I agree that the contract is to be construed according to the intention of the parties; but I consider that the intention of the covenant of seisin, as uniformly expounded in the English law, is only to indemnify the grantee for the consideration paid. This was the



pay mesne profits to the holder of the paramount title.' Where the possession of the grantee has never been disturbed, only nominal damages can be recovered for a mere technical breach.<sup>2</sup>

**§ 895. Proof of real consideration.**—In this country the clause stating the consideration is not conclusive. A different rule seems to prevail in England. Mr. Mayne says: "Where the damages are calculated upon the basis of the purchase money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence. Where any consideration is mentioned, if it is not said also 'and for other considerations,' you cannot enter into any proof of any other; the reason is, it would be contrary to the deed; for when the deed says it is in consideration of a particular thing, that imports the whole consideration, and is negative to any other."<sup>3</sup> But in the United States the rule is that the consideration clause is not conclusive, and that evidence is admissible to show the true consideration.<sup>4</sup> It follows from this rule that either party can

settled rule at common law, upon the ancient warranty, of which this covenant of seisin is one of the substitutes; and all the reasons of policy which prevent the extension of the covenant to the increased value of the land apply equally, if not more strongly, to prevent its extension to improvements made by the purchaser. A seller may be presumed, at all times, able to return the consideration which he actually received; but to compel him to pay for extensive improvements, of the extent of which he could have made no calculation, and for which he received no consideration, may suddenly overwhelm him and his family in irretrievable ruin." See, also, *Morris v. Matthews*, 3 Strob. 199; *Nelson v. Matthews*, 2 Hen. & M. 164; 3 Am. Dec. 620; *Blessing v. Beatty*, 1 Rob. (Va.) 287; *Bond v. Quattlebaum*, 1 McCord, 584; 10 Am. Dec. 702.

<sup>1</sup> *Hutchins v. Roundtree*, 77 Mo. 500. And see *Stebbins v. Wolf*, 33 Kan. 765.

<sup>2</sup> *Boon v. McHenry*, 55 Iowa, 202.

<sup>3</sup> *Mayne on Damages* (2d ed.), 148.

<sup>4</sup> *Guinotte v. Chouteau*, 34 Mo. 154; *Hodges v. Thayer*, 110 Mass. 286; *Martin v. Gordon*, 24 Ga. 533; *Gavin v. Bucklers*, 41 Ind. 528; *Goodspeed v. Fuller*, 46 Me. 141; 71 Am. Dec. 572; *Bullard v. Briggs*, 7 Pick. 533; 19 Am. Dec. 292; *Watson v. Blaine*, 12 Serg. & R. 131; 14 Am. Dec. 669; *Gulley v. Grubbs*, 1 Marsh. J. J. 388; *Wade v. Merwin*, 11 Pick. 280; *Duval v. Bibb*, 4 Hen. & M. 113; 4 Am. Dec. 506; *Clapp v. Tirrell*, 20 Pick. 247; *Higdon v. Thomas*, 1 Har. & G. 139; *Hayden v.*

prove what was in fact the real consideration, when the amount stated in the deed is not the true one. The defendant may show that the consideration was less than that expressed in the conveyance for the purpose of diminishing the amount of damages.<sup>1</sup> So, on the other hand, for the purpose of augmenting the damages, the plaintiff may show that the real consideration was larger.<sup>2</sup> It is permissible to show that the consideration was property. In such a case, the damages will be measured by the value of the property at the time of the execution of the conveyance, with interest.<sup>3</sup> But, of course, it is competent for the parties to agree upon the value of the property as the whole or a part of the consideration. When such agreement is made, the value so determined will be the amount to be recovered, rather than the value which, at the trial, the property might be proven to have.<sup>4</sup>

Mentzer, 10 Serg. & R. 329; McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; Wolfe v. Hauver, 1 Gill, 84; Strawbridge v. Cartledge, 7 Watts. & S. 399; Park v. Cheek, 2 Head. 451; Monahan v. Colgin, 4 Watts, 436; Dexter v. Manley, 4 Cush. 26; Jack v. Dougherty, 3 Watts, 151; Burbank v. Gould, 15 Me. 118; Bingham v. Weiderwax, 1 Comst. 509; Bolton v. Johns, 5 Barr. 145; 47 Am. Dec. 404; Meeker v. Meeker, 16 Conn. 383; Harvey v. Alexander, 1 Rand. 219; 10 Am. Dec. 519; Jones v. Ward, 10 Yerg. 160; Curry v. Lyles, 2 Hill (S. O.). 404; Garrett v. Stuart, 1 McCord, 514; Wilson v. Shelton, 9 Leigh, 343; Hartley v. McAnulty, 4 Yeates, 95; 2 Am. Dec. 396; Engleman v. Craig, 2 Bush, 424; Morse v. Shattuck, 4 N. H. 229; 17 Am. Dec. 419; Barnes v. Learned, 5 N. H. 284; Nutting v. Herbert, 35 N. H. 120; Belden v. Seymour, 8 Conn. 304; 21 Am. Dec. 661; Henderson v. Henderson, 13 Mo. 151; Bircher v. Watkins, 13 Mo. 521; Hallam v. Todhunter, 24 Iowa, 166; Harlow v. Thomas, 15 Pick. 66; Cushing v. Rice, 46 Me. 303; 71 Am. Dec. 579; Moore v. McKie, 5 Smedes & M. 238; Williamson v. Test, 24 Iowa, 138; Byrnes v. Rich, 5 Gray, 518.

<sup>1</sup> Harlow v. Thomas, 15 Pick. 70; Morse v. Shattuck, 4 N. H. 229; 17 Am. Dec. 419; Williamson v. Test, 24 Iowa, 139; Bingham v. Weiderwax, 1 Comst. 514; Moore v. McKie, 5 Smedes & M. 238; Swafford v. Whipple, 3 Greene, 267; 54 Am. Dec. 498; Cox v. Henry, 8 Casey, 19; Martin v. Gordon, 24 Ga. 535.

<sup>2</sup> Dexter v. Manley, 4 Cush. 26; Belden v. Seymour, 8 Conn. 304; 21 Am. Dec. 661; Guinotte v. Chouteau, 34 Mo. 154.

<sup>3</sup> Hodges v. Thayer, 110 Mass. 286; Lacey v. Marnan, 37 Ind. 168; Bonnon's Estate v. Urton, 3 Greene, 228.

<sup>4</sup> Williamson v. Test, 24 Iowa, 138.

§ 896. **Mitigation of damages.**—In mitigation of damages, the defendant may show that a certain parcel was included in the deed by mistake, and that he received no part of the consideration price for it.<sup>1</sup> “Whatever evidence,” said the court, in one of these cases, “therefore, tended to show the consideration actually paid for the premises before granted to Merrill, or to show that no consideration was paid for them, for the reason that it was known and understood by the parties that they were not to pass by the conveyance, was competent and admissible on the question of damages, although inadmissible upon the issue raised by the plea of *omnia performavit*. If the jury or an auditor should find that nothing was paid for the Merrill place, although it is clearly included within the deed, but that both parties knew and understood it to have been previously sold, and that, in fact, it was included in the deed by mistake, or through inadvertence, the plaintiff would be entitled to nominal damages only.”<sup>2</sup>

§ 897. **Knowledge of grantor's want of title.**—The right of recovery for a breach of a covenant of seisin, is not affected by the fact that it was known to one or both

<sup>1</sup> Leland v. Stone, 10 Mass. 459; Barnes v. Learned, 5 N. H. 264; Nutting v. Herbert, 35 N. H. 121; s. c. 37 N. H. 346; Stewart v. Hadley, 55 Mo. 235.

<sup>2</sup> Nutting v. Herbert, 35 N. H. 127, per Fowler J. In Burke v. Beveridge, 15 Minn. 208, the court, in speaking of a breach of the covenants of seisin and good right to convey, and the effect of the covenant securing the paramount title which, by virtue of another covenant in the deed, passed to the covenantee, said: “Though by the breach of the covenants in question, as thereby the title wholly fails, the law restores to the plaintiff the consideration paid, with interest, yet, if by virtue of another covenant in the same deed, also intended to secure to her the subject matter of the conveyance, she has obtained that seisin, it would be altogether inequitable that she should have that seisin, and also the consideration paid for it; that is to say, that if there exist facts which would render inequitable the application of the rule that such covenants, if broken at all, are broken as soon as made, and the purchaser's right of action to recover back the consideration is then perfect, such facts are to be taken into consideration by the jury, not as a bar to the action, but in mitigation of damages.”

of the parties, at the time the covenant was made, that the grantor had no title to the land or any part of it.<sup>1</sup> Bailey, P.J., in the case cited, quoted with approval the language of the supreme court of that State in a former case:<sup>2</sup> "Where a person insists upon and obtains covenants for title, he has the right, when obtained, to rely upon them and enforce their performance, or recover damages for their breach. The vendor is under no compulsion to make covenants when he sells land, but, having done so, he must keep them or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person may warrant an article to be sound when both buyer and seller know that it is unsound; so the seller may warrant the quantity or quality of an article he sells when both parties know that it is not of the quality or does not contain the quantity warranted. In fact the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality."

**§ 898. Value of land as measure of damages.**—As has been pointed out, the measure of damages in most cases is the consideration paid with interest. But there may be cases where to apply such a rule would be to deny to the covenantee all relief. No consideration whatever may be mentioned in the deed, and it may be impossible to learn the true consideration. The consideration may have been paid by a third person at whose request the covenants in the deed may have been inserted. In cases of this character, the circumstances of each particular case must control the rule as to damages, and; generally, the value of the land at the time the conveyance is made, with interest, will form the basis of damages.<sup>3</sup> An agree-

<sup>1</sup> *Wadhams v. Innes*, 4 Bradw. (Ill. App.) 642, 646.

<sup>2</sup> *Beach v. Miller*, 51 Ill. 211; 2 Am. Rep. 290.

<sup>3</sup> *Smith v. Strong*, 14 Pick. 128; *Byrnes v. Rich*, 5 Gray, 518; *Hodges*

ment was made between a debtor and a creditor, whereby the latter agreed to receive a certain lot of land, in full satisfaction of the debt. The former agreed with another for the purchase of the land, and requested him to make the deed directly to the creditor with warranty. This was done, the deed expressing a large nominal consideration. It was delivered by the debtor to the creditor in satisfaction of the debt. In a suit upon the covenant, Mr. Chief Justice Shaw said: "Then what was the actual consideration as between the plaintiff and defendant? It is very clear that the consideration expressed in the deed is no criterion; the actual consideration may be always inquired into by evidence *aliunde*. Nor is it the sum agreed to be paid to the defendant by Leighton [the debtor]; to that the plaintiff was a stranger. Nor is it the nominal amount of the note which the plaintiff agreed to surrender and release to Leighton, as the consideration to be by him paid for the land. That may have been a security of little value; no evidence of its value was given; and, besides, to that part of the transaction the defendant was a stranger. It seems, therefore, to be a case to which the ordinary general rule cannot apply, and which must be determined according to its particular circumstances upon the general principles applicable to breaches of contract; the party shall recover a sum in damages which will be a compensation for his loss. . . . If the failure of the title extended to the whole of the land, then the entire value of the land is to be the measure; if to a part only, and the plaintiff does not tender a reconveyance of the part upon which the conveyance operated to give title to the grantee, then the value of the part, the title to which failed, with interest, will be taken as the measure of damages."<sup>1</sup> When damages have been recovered for a total breach of these covenants, such fact is a bar to any further recovery.<sup>2</sup> When

*v. Thayer*, 110 Mass. 286. See *Staples v. Dean*, 114 Mass. 125; *Mason v. Kellogg*, 38 Mich. 132.

<sup>1</sup> In *Byrnes v. Rich*, 5 Gray, 518.

<sup>2</sup> *Rawle on Covenants* (4th ed.) 263, and note; *Outram v. Morwood*, 3

the covenantee has never been in possession and is unable to obtain it, the action upon the covenant is, in effect, an action for money had and received, on account of failure of consideration.<sup>1</sup>

**§ 899. Undisturbed possession of grantee.**—If there has been no disturbance of the possession of the grantee for a sufficient length of time to enable him to acquire title by the statute of limitations, a recovery on the covenant should be for no more than nominal damages.<sup>2</sup> The consideration money and interest are the measure of damages when the grantee acquires nothing by the conveyance. But when he acquires anything by his deed, this must be considered in estimating the damages. “The weight of American authority has determined that the covenant for seisin is broken, if broken at all, so soon as it is made, and thereby the immediate right of action accrues to him who has received it. But in such case, the grantee is not entitled, as matter of course, to recover back the consideration money. The damages to be recovered are measured by the actual loss at that time sustained. If the purchaser has bought in the adverse right, the measure of his damages is the sum paid. If he has been actually deprived of the whole subject of his bargain, or of a part of it, they are measured by the whole consideration money in the one case, and a corresponding part of it in the other.”<sup>3</sup> But the mere fact that

East, 346; *Nosler v. Hunt*, 18 Iowa, 212; *Duchess of Kingston's case*, 2 Smith's Leading Cases (7th ed.), 778; *Markham v. Middleton*, 2 Strob. 1259; *Donnell v. Thompson*, 10 Me. 174; 25 Am. Dec. 216. And see *Parker v. Brown*, 15 N. H. 176; *Kincaid v. Brittain*, 5 Sneed, 119; *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22.

<sup>1</sup> *Baker v. Harris*, 9 Ad. & E. 532.

<sup>2</sup> *Somerville v. Hamilton*, 4 Wheat. 230; *Wilson v. Forbes*, 2 Dev. 30; *Pate v. Mitchell*, 23 Ark. 591; 79 Am. Dec. 114; *Garfield v. Williams*, 2 Vt. 328; *Cowan v. Silliman*, 4 Dev. 47. See *Hencke v. Johnson*, 62 Iowa, 555.

<sup>3</sup> *Lawless v. Collier*, 19 Mo. 480. In *Hartford and Salisbury Ore Co. v. Miller*, 41 Conn. 112, the court says: “But if the party takes anything by his deed, directly or indirectly, by its own force, or by its co-operation with other instruments or other circumstances, whether it be the

the covenantee is in the undisturbed possession of the premises, where his possession has not ripened into title, is no defense.<sup>1</sup>

§ 900. **Partial breach.**—Where the covenant is for a fee simple, and the estate is subject to a life estate, recovery may be had for the value of the less estate.<sup>2</sup> If, after these covenants are broken, and before the covenantee commences action, the paramount title is acquired by the covenantor, which, by the operation of other covenants, is transferred to the covenantee, the damages may be mitigated or reduced to a nominal amount by this fact.<sup>3</sup> If the estate which the grantor had and by deed transferred was a copyhold, and he had covenanted for a seisin in fee, there is a breach of the covenant, and the difference in value between a fee simple and a copyhold estate is the measure of damages.<sup>4</sup> When there has been a partial breach by a failure of title to part of the land

entire thing purchased or a part of it, its value must be considered in considering the damages." See *Tanner v. Livingston*, 12 Wend. 83; *Kimball v. Bryant*, 25 Minn. 496; *Terry v. Drabenstadt*, 68 Pa. St. 400; *Guthrie v. Pugsley*, 12 Johns. 126; *Mills v. Catlin*, 22 Vt. 98; *Cockrell v. Proctor*, 65 Mo. 41; *Lockwood v. Sturtevant*, 6 Conn. 373.

<sup>1</sup> *Akerly v. Vilas*, 21 Wis. 109. But in Missouri, it is held, where the covenant is considered as running with the land, that if the covenantee has not been compelled to yield possession to a paramount title, he can only recover nominal damages. He is not permitted to give up possession and seek substantial damages: *Cockrell v. Proctor*, 65 Mo. 41. And see *Hencke v. Johnson*, 62 Iowa, 555.

<sup>2</sup> *Guthrie v. Pugsley*, 12 Johns. 126; *Recohs v. Younglove*, 8 Baxt. 385; *Tanner v. Livingston*, 12 Wend. 83. See *Rickert v. Snyder*, 10 Wend. 416; *Blanchard v. Blanchard*, 48 Me. 174. Life tables may be used for the purpose of computing the value of the life estate: *Mills v. Catlin*, 22 Vt. 98; *Donaldson v. Mississippi etc. Ry. Co.*, 18 Iowa, 280; 87 Am. Dec. 391.

<sup>3</sup> *Kimball v. Bryant*, 25 Minn. 496, 500; *Baxter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49; *Burke v. Beveridge*, 15 Minn. 205; *Noonan v. Isley*, 21 Wis. 138; *Knowles v. Kennedy*, 82 Pa. St. 445; *McCarty v. Leggett*, 3 Hill, 134; *King v. Gilson*, 32 Ill. 348; 83 Am. Dec. 269. See *Tucker v. Clark*, 2 Sand. Ch. 96; *Boulter v. Hamilton*, 15 Up. Can. C. P. 125; *Blanchard v. Ellis*, 1 Gray, 195; 61 Am. Dec. 417; *McInnis v. Lyman*, 61 Wis. 191.

<sup>4</sup> *Gray v. Briscoe*, Noy, 142. See *Wace v. Brickerton*, 3 De Gex & S. 751.



conveyed, either party is entitled to show, for the purpose of determining the damages, the value which that part, to which title has failed, relatively bears to the whole.<sup>1</sup> "The law will apportion the damages to the measure of value between the land lost and the land preserved."<sup>2</sup> In a case in Massachusetts, it was contended that the proper method of determining damages was by ascertaining the proportion in quantity which the part, to which there had been a failure of title, had to the remainder. But the court replied: "This is not a just rule, for the value may be unequal. The true and just rule is, that the proportional value, and not the quantity of the several parts of the land, should be the measure of damages."<sup>3</sup> The grantors had the fee in two-sixths of an estate and a life estate in the remaining four-sixths. Upon a breach of the covenant, it was held that to measure the damages, the value of the life estate should be deducted from four-sixths of the purchase price, and that as there was no one to call upon the grantee for the mesne profits, no interest should be allowed.<sup>4</sup> If a constructive eviction is founded on the existence of a tax deed which a third person held at the time of the execution of the deed, the grantor may

<sup>1</sup> *Morris v. Phelps*, 5 Johns. 49, 56; 4 Am. Dec. 323. See *Wallace v. Talbot*, 1 McCord, 467; *Griffin v. Reynolds*, 17 How. 611; *Dickens v. Shepherd*, 3 Murph. 526; *Cornell v. Jackson*, 3 Cush. 506, 510.

<sup>2</sup> *Morris v. Phelps*, *supra*. See, also, *Blanchard v. Hoxie*, 34 Me. 376; *Blanchard v. Blanchard*, 48 Me. 177; *Morrison v. McArthur*, 43 Me. 567; *Bryan v. Smallwood*, 4 Har. & McH. 483; *Hubbard v. Norton*, 10 Conn. 435; *Rickert v. Snyder*, 9 Wend. 416; *McNear v. McComber*, 18 Iowa, 14; *Nyce v. Obertz*, 17 Ohio St. 76; *Phillips v. Reichert*, 17 Ind. 120; 79 Am. Dec. 463; *Hoot v. Spade*, 20 Ind. 326.

<sup>3</sup> *Cornell v. Jackson*, 3 Cush. 506, 510.

<sup>4</sup> *Guthrie v. Pugsley*, 12 Johns. 126. "There is no settled rule of law," said the court, "to ascertain the damages in such a case, without having a jury to assess them, as they must depend principally upon the value of the estate during the lives of the defendants, which must be deducted from four-sixths of the consideration money. Nor ought interest to be allowed during their lives, for no one, during that time, will have a right to turn the plaintiff out of possession, or call on him for the mesne profits." See, also, *Downer v. Smith*, 38 Vt. 464; *Tone v. Wilson*, 81 Ill. 529; *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46; *Scantlin v. Allison*, 12 Kan. 851.

contest the validity of the tax deed in an action for a breach of the covenant. The right of the grantor to contest the validity of the tax deed is not affected by the fact that the statute of limitations has since run in favor of the tax deed. The rights of the respective parties are to be determined by the conditions as they existed at the time at which the conveyance was executed.<sup>1</sup>

**§ 901. Treating partial failure as entire.**—Where there is an entire failure there can be a total recovery, and where there has been a partial failure there can be a partial recovery. But can a party treat a partial failure as entire and recover the entire purchase money, or must

<sup>1</sup> *McInnis v. Lyman*, 62 Wis. 191. When title fails as to a part of the land conveyed, damages should be awarded in such proportion to the whole consideration as the part bears to the whole tract: *Beaupland v. McKeen*, 28 Pa. St. 124; 70 Am. Dec. 115; *Messer v. Ostreich*, 52 Wis. 684; *Remple v. Whorton*, 68 Wis. 626; 32 N. W. Rep. 690; *Larson v. Cook*, 85 Wis. 564; 55 N. W. Rep. 703; *McLennan v. Prentice*, 85 Wis. 427; 55 N. W. Rep. 764; *Hunt v. Raplee*, 44 Hun, 149; *Furniss v. Ferguson*, 15 N. Y. 437; *Hymes v. Esty*, 133 N. Y. 342; 31 N. E. Rep. 105; *Guthrie v. Pugsley*, 12 Johns. 126; *Staats v. Ten Eyck*, 3 Caines, 111; 2 Am. Dec. 254; *Morris v. Phelps*, 5 Johns. 49; 4 Am. Dec. 323; *Tone v. Wilson*, 81 Ill. 529; *Major v. Dunnivant*, 25 Ill. 262; *Wadhams v. Innes*, 4 Ill. App. 642; *Weber v. Anderson*, 73 Ill. 439; *Clapp v. Herdman*, 25 Ill. App. 509; *Threkeld v. Fitzhugh*, 2 Leigh, 451; *Clarke v. Hardgrove*, 7 Gratt. 399; *Conrad v. Effinger*, 87 Va. 59; 24 Am. St. Rep. 646; 12 S. E. Rep. 2; *Olick v. Green*, 77 Va. 827; *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13; 18 Atl. Rep. 171; *Parker v. Brown*, 15 N. H. 176; *Partridge v. Hatch*, 18 N. H. 494; *Blanchard v. Blanchard*, 48 Me. 174; *Blanchard v. Hoxie*, 34 Me. 376; *Koestenbader v. Peirce*, 41 Iowa, 204; *Hoot v. Spade*, 20 Ind. 326; *McDunn v. Des Moines*, 39 Iowa, 286; *Mische v. Baughn*, 52 Iowa, 528; *Long v. Sinclair*, 40 Mich. 569; *Scheible v. Slagle*, 89 Ind. 323; *Wright v. Nipple*, 92 Ind. 310; *Price v. Deal*, 90 N. C. 290; *Saunders v. Flaniken*, 77 Tex. 662; 14 S. W. Rep. 236; *White v. Holley*, 3 Tex. Civ. App. 590; 24 S. W. Rep. 831; *Gass v. Sanger* [Tex. Civ. App.], 30 S. W. Rep. 502; *Weeks v. Barton* [Tex. Civ. App.], 31 S. W. Rep. 1071; *Keesey v. Old*, 82 Tex. 22; 17 S. W. Rep. 928; *Stark v. Olney*, 3 Or. 88; *Crawford v. Crawford*, 1 Bailey, 128; 19 Am. Dec. 660; *Lewis v. Lewis*, 5 Rich. 12; *Wallace v. Talbot*, 1 McCord, 466; *Jeter v. Glenn*, 9 Rich. 374; *Aiken v. McDonald*, 43 S. C. 29; 20 S. E. Rep. 796; *Hunt v. Nolen* (S. O.), 24 S. E. Rep. 310; *Nyce v. Obertz*, 17 Ohio, 71; *Moses v. Wallace*, 7 Lea, 413; *Whitzman v. Hirsh*, 87 Tenn. 513; *Metie v. Dow*, 9 Lea, 93; *Downer v. Smith*, 38 Vt. 464; *Butcher v. Peterson*, 26 W. Va. 447; 53 Am. Rep. 89.

he retain whatever title was acquired, permitting him to recover only the difference in value between that title and the entire estate? The question arose in Tennessee, where a deed containing covenants of seisin and warranty purported to convey an absolute estate to the entire land in fee, but in fact it conveyed only a life estate. The court held that the measure of damages was the difference between the value of the life estate and the fee, and that as to the life estate the conveyance remained in force.<sup>1</sup> To the argument that a purchaser ought not to be compelled to accept a title to a part or an estate for life, when the inducement to the purchase was the entire estate, the court said the reply was that these "would be important considerations upon an application to a court of equity for a decision, but if the purchaser choose to sue upon the covenant at law without a rescission or offer to rescind, he can only recover to the extent of the breach, the contract of sale and conveyance remaining in force as to the part to which the title does not fail."<sup>2</sup>

**§ 902. Burden of proof on partial breach.**—Where a covenantee sues a remote grantor for failure of title to a portion of the land which the covenantee had purchased from an intermediate grantor, he can recover, of course, a proportionate share of the consideration received for the deed. But as to the relative value of the portion purchased by the covenantee bringing suit, he has the burden of proof. He is the one seeking relief, and he must establish all the facts showing that he is entitled to relief, and to what extent it should be given.<sup>3</sup>

**§ 903. Power to purchase title.**—The fact that the purchaser might have removed the defect or bought in the outstanding title, can have no effect upon his claim for damages for a breach of the covenants. "It is true," said the court in one case, "the grantee, while the prior

<sup>1</sup> *Rechs v. Younglove*, 8 Baxt. 385.

<sup>2</sup> *Rechs v. Younglove*, *supra*.

<sup>3</sup> *Mische v. Baughn*, 52 Iowa, 528.

mortgage remained only an encumbrance, might have discharged it if he had possessed the pecuniary ability, and thus saved himself from eviction, but then so might the grantor; the grantee, whether able or willing or not, was in no way bound to do it, and had a right to expect that the grantor would do it, while he, the grantor, was bound to do it, bound by the obligations of his express covenant."<sup>1</sup> Lands of which the grantors supposed

<sup>1</sup> *Lloyd v. Quimby*, 5 Ohio St. 265; *Miller v. Halsey*, 2 Green, 48; *Stewart v. Drake*, 4 Halst. 143; *Chapel v. Bull*, 17 Mass. 221; *Elder v. True*, 32 Me. 104; *Burk v. Clements*, 16 Ind. 132; *Norton v. Babcock*, 2 Met. 510. In the last cited case the grantor had obtained the premises under a judgment, leaving an equity of redemption in the judgment debtor. This equity of redemption was levied upon by another judgment creditor and purchased. The purchaser notified the grantee of his intention to redeem, and the latter paid him a sum of money for the purpose of prevention, the amount for which the equity had been purchased and interest both being \$602.89. The deed contained the usual covenants of seisin, warranty, and against encumbrances. In a suit upon these covenants, Chief Justice Shaw said: "It appears by the statement of facts reported as found by the jury that more than a month before the expiration of the right of redeeming the estate levied upon by the defendant, and by him conveyed to the plaintiff with covenants of warranty, Edward A. Phelps, the holder of this right to redeem, gave notice to the plaintiff of his intention to redeem; whereupon the plaintiff in good faith, and in order to discharge that right to redeem and enable himself to retain the estate, paid \$602.89, in order to extinguish such encumbrance. The value of the estate at that time, as found by the jury, was \$1,200; for the one moiety which was the subject of the levy, and the estate to be redeemed, and the value of the improvements made upon it, \$500. It is contended for the plaintiff that the amount thus paid by him to extinguish the encumbrance is the measure of his damage; but we think that this cannot be laid down as a rule of damages without considerable qualification. Where the encumbrance is of such a character that if not extinguished it would take the whole estate, and it can be extinguished for the value of the estate, so that the amount paid for its extinguishment would bring a less onerous burden upon the covenantor than he would have to sustain by an eviction, it being for his benefit as well as that of the owner to extinguish it, the amount paid for extinguishing would be the measure of damages, because it would afford the plaintiff perfect indemnity. Otherwise, the amount thus paid exceeds the amount which the covenantor would have been bound to pay if the plaintiff had been evicted. For instance, we will suppose the case of a conveyance with the usual covenants against encumbrances and covenants of warranty. There is an outstanding mortgage, and the mortgagee is about to foreclose and oust the mortgagor. He must redeem or be evicted. If he is evicted, he will have a remedy on his covenant, and

themselves seised were sold with covenants of seisin and warranty, but it appeared subsequently that they had

recover the value of the land at the time of the eviction and interest. Now, if the value of the land be \$2,000, and the amount of the mortgage, with interest, \$2,500, should the grantee redeem and pay \$2,500 to extinguish the encumbrance, he could not recover that sum of his warrantor, although the encumbrance could not be extinguished for less, because the covenantor is liable only for the value of the land. But if the mortgage should amount to \$1,500, and the grantee should pay that sum to redeem, it would constitute the measure of damages, because it would afford an indemnity to the plaintiff, and bring a less charge on the covenantor than if the grantee had permitted the mortgagee to foreclose."

The court then referred to the case of *Wyman v. Brigden*, 4 Mass. 150, where a levy was rightfully made upon the estate as the property of another for \$1,800, and the plaintiff, who had never been out of actual possession, redeemed by paying \$1,800, the estate being worth \$3,000, in which it was held that the sum paid for the redemption should be the measure of damages, and continued: "We are then to apply this rule to the present case, and the result will be that if the sum of \$602.89, paid by the plaintiff to extinguish the right of redemption, was less than the defendant would have been liable for had the plaintiff permitted Phelps to redeem, then that is the measure of damages for which the defendant is now liable. If it exceeds that amount, then he is liable only for the smaller amount. . . . Had the plaintiff declined the offer to pay, what would have been the amount of damages? As the estate granted by the defendant to the plaintiff actually passed by the conveyance, the defendant being seised, and having good right to convey, subject only to redemption by his creditor, the amount of damages he would have been liable for on his covenants was the value of the land at the time of the eviction: *Gore v. Brazier*, 3 Mass. 543; 3 Am. Dec. 182. The value of the land, independent of the improvements, was then \$1,200, and the value of the improvements \$500, making in round numbers \$1,700. By improvements, we here understand buildings or betterments, other than repairs made by the defendant or the plaintiff after the levy, and before the expiration of the year allowed by law for the redemption. The great difficulty probably arises from the fact of these expensive betterments made upon a defeasible estate. We are of the opinion that if they were made by the creditor after the levy, the debtor could not be charged with them on redemption, for the reasons above stated; and being annexed to the realty, and having become a part of the freehold, they would have constituted a part of the actual value at the time of redemption. Suppose them made by the plaintiff, they were made by him after he acquired a title purporting to be absolute and indefeasible under the defendant's deed of warranty; and we are of opinion that, as between the plaintiff and defendant, the loss must fall on the latter. It arises from want of caution in giving such a deed, when in fact he had only a defeasible estate."

no title. The grantee sued in the covenant of seisin, six years afterward, and the original grantors purchased the title of the true owners, and tendered a new deed to the grantee, but he refused to accept it. They then filed a bill in equity to compel him to receive the conveyance and to stay his proceedings on the covenant; but it was held that the court possessed no power to compel the grantee to take the deed or to disturb his action on the covenant.<sup>1</sup>

**§ 904. Keeping public street open.**—While a party may maintain an action for damages for the breach of a covenant, it does not follow in all instances that he can secure relief by enforcing the specific performance of a covenant or agreement. A deed conveyed a tract of land describing it by metes and bounds, and at the close of the description of the property added, "together with the right of way in, upon, and over a street thirty-five feet in width, called Minna street, running from Tenth street to the southwesterly line of the lot of land thereby conveyed (to wit, said last-described parcel of land), said street forever to be and remain free and open as a public street." After the death of the grantor, the land, including the street, was distributed to his heirs, and the grantee requested that the street be kept open, and this request being refused, he brought an action for specific performance. The court held that if the language constituted a covenant, it was one of seisin, of warranty, or of quiet enjoyment; if it should be regarded as a covenant of seisin, it was broken as soon as executed, and a claim for the breach should have been presented to the administratrix of the grantor's estate, and if considered as a covenant of warranty or quiet enjoyment, the breach occurring

<sup>1</sup> *Tucker v. Clark*, 2 Sand. Ch. 96. See, also, *Burton v. Reeds*, 20 Ind. 87; *Noonan v. Isley*, 21 Wis. 138; *Bingham v. Weiderwax*, 1 Comst. 513; *Blanchard v. Ellis*, 1 Gray, 195; 61 Am. Dec. 417; *Porter v. Hill*, 9 Mass. 36; 6 Am. Dec. 22; *Kincaid v. Brittain*, 5 Sneed, 123; *Parker v. Brown*, 15 N. H. 188.

after the death of the covenantor, the heirs, as they were not named in the covenant, were not bound.<sup>1</sup>

§ 905. **Covenant against encumbrances.**—This covenant is intended to protect the grantee against rights or interests in third persons, which, while consistent with the fee being in the grantor, yet diminish the value of the estate.<sup>2</sup> As a general rule, this covenant does not run with the land, because, if an encumbrance exists, the covenant is broken as soon as it is made.<sup>3</sup> In South Carolina, however, it is held that the covenant runs with the land, although it may be broken at once upon the making of the deed.<sup>4</sup> And in Indiana the same doctrine obtains.<sup>5</sup> In Iowa, although the covenant is considered as *in presenti*, nevertheless if a second or third grantee from the covenantee be compelled to remove the encumbrance to protect his title, he may sue upon the covenant and recover what he has been forced to pay.<sup>6</sup> In Illinois, a remote grantee may maintain an action against the original grantor, if the grantee sustains the damage, although the covenant is not considered as running with the land.<sup>7</sup>

<sup>1</sup> McDonald v. McElroy, 60 Cal. 484. It was also held in this case that the grantee had no right of way of necessity over the grantor's lands.

<sup>2</sup> Carey v. Daniels, 8 Met. 482; Prescott v. Trueman, 4 Mass. 629; 3 Am. Dec. 246; Chapman v. Kimball, 7 Neb. 399.

<sup>3</sup> Blondeau v. Sheridan, 81 Mo. 545; Cathcart v. Bowman, 5 Pa. St. 317; Clark v. Swift, 3 Met. 392. But see Cole v. Kimball, 52 Vt. 639; Boyd v. Belmont, 58 How. Pr. 513.

<sup>4</sup> McGrady v. Brisbane, 1 Nott & McC. 104.

<sup>5</sup> Martin v. Baker, 5 Blackf. 232.

<sup>6</sup> Knadler v. Sharp, 36 Iowa, 236.

<sup>7</sup> Richard v. Bent, 59 Ill. 43; 14 Am. Rep. 1. Justice Sheldon said: "Where the covenant of seisin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damages and all the damages that can result from the breach have accrued; the measure of damages is the purchase money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of *choses in action*. But as the covenant against encumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the encumbrance. And where there is the barren right of re-



In Nebraska, this covenant is considered an agreement that the grantor has an unencumbered title, and it is not viewed as having the nature of a covenant of indemnity.<sup>1</sup>

**§ 906. Encumbrance defined.**—It is sometimes extremely difficult to determine whether or not a particular right in another is an encumbrance, within the meaning of the covenant against encumbrances. This difficulty arises from the fact that the word “encumbrance” does not admit of a general, and at the same time accurate, definition. Besides, the circumstances of each particular case must be considered. Take, for instance, the case of an outstanding lease. It can easily be imagined that, in many cases, the fact that a piece of property was leased for a number of years would, were the property sought for an investment, add to its value; while, if the purchaser desired the present possession of the property, the existence of a lease might detract from its market value. The definition of an encumbrance that finds the most favor is thus given by Bouvier: “Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee.”<sup>2</sup> To this general rule, the modification has been added that: “Nothing which constitutes a part of the estate, or which, as between the parties, is to be regarded as an incident to

covery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary *chose in action*.”

<sup>1</sup> *Chapman v. Kimball*, 7 Neb. 399. In Massachusetts this covenant was originally not assignable: *Whitney v. Dinsmore*, 6 Cush. 124; *Tufts v. Adams*, 8 Pick. 547; *Thayer v. Clemence*, 22 Pick. 490. But this is now changed by statute: Gen. Stat., c. 89, § 17. See *Foote v. Burnet*, 10 Ohio, 332; 36 Am. Dec. 90. For a case holding that the easement of the public over flats not built upon or inclosed, is not an encumbrance within the meaning of the usual covenant against encumbrances, see *Montgomery v. Reed*, 69 Me. 510.

<sup>2</sup> Bouv. Law Dict., tit. Encumbrances; 2 Greenleaf on Evidence, § 242. See *Prescott v. Trueman*, 4 Mass. 630; 3 Am. Dec. 246; *Mitchell v. Warner*, 5 Conn. 527; *Carter v. Denman*, 3 Zab. 273.

which the estate is subject, can be deemed an encumbrance."<sup>1</sup>

§ 907. **What are considered encumbrances.**—A right to cut and maintain a drain is deemed an encumbrance;<sup>2</sup> so is a right to dam up the water of a stream passing through the land;<sup>3</sup> so is a right to maintain an artificial watercourse,<sup>4</sup> or a right to cut timber on the land conveyed.<sup>5</sup> A right of dower is also an encumbrance, and it is immaterial whether it is inchoate or consummate by the death of the husband.<sup>6</sup> The covenant is broken by the existence of a paramount private right of way,<sup>7</sup> or by the existence of taxes, due at the time the conveyance is executed,<sup>8</sup> or which levied subsequently have, by operation of law, relation back to the date of the deed.<sup>9</sup> But, of course, if the taxes levied subsequently become a lien only from the time they are levied, or do not relate so

<sup>1</sup> *Dunklee v. Wilton R. R. Co.*, 4 Fost. (N. H.) 489.

<sup>2</sup> *Smith v. Sprague*, 40 Vt. 43.

<sup>3</sup> *Morgan v. Smith*, 11 Ill. 199; *Gin v. Hancock*, 31 Me. 42. See *Isele v. Arlington Five Cents Savings Bank*, 135 Mass. 142; *Gawtry v. Leland*, 31 N. J. Eq. 385.

<sup>4</sup> *Prescott v. White*, 21 Pick. 341; 32 Am. Dec. 266.

<sup>5</sup> *Spurr v. Andrew*, 6 Allen, 420; *Cathcart v. Bowman*, 5 Barr. 319.

<sup>6</sup> *Walker v. Deaver*, 79 Mo. 664; *Shearer v. Ranger*, 22 Pick. 447; *Jeter v. Glenn*, 9 Rich. 376; *Bigelow v. Hubbard*, 97 Mass. 195; *Russ v. Perry*, 49 N. H. 549; *Fuller v. Wright*, 18 Pick. 405. See *Donnell v. Thompson*, 10 Me. 170; 25 Am. Dec. 216; *Porter v. Noyes*, 2 Greenl. 26; 11 Am. Dec. 30; *Smith v. Cannel*, 32 Me. 126; *Hatcher v. Andrews*, 5 Bush, 561; *Blanchard v. Blanchard*, 48 Me. 177; *Runnells v. Webber*, 59 Me. 488; *Henderson v. Henderson*, 13 Mo. 152; *McAlpin v. Woodruff*, 11 Ohio St. 120; *Carter v. Denman*, 3 Zab. 273. But see *Powell v. Monson Co.*, 3 Mason, 355, where Judge Story said that, in his opinion, the covenant against encumbrances was not broken by an inchoate right of dower. See, however, *Ward v. Ashbrook*, 78 Mo. 515.

<sup>7</sup> *Russ v. Steele*, 40 Vt. 310; *Wilson v. Cochran*, 10 Wright, 233. But see *McMullin v. Wooley*, 2 Lans. 394; *Wetherbee v. Bennett*, 2 Allen, 428.

<sup>8</sup> *Fuller v. Jillette*, 9 Biss. 296; *Ingalls v. Cooke*, 21 Iowa, 560; *Plowman v. Williams*, 6 Lea (Tenn.), 268; *Almy v. Hunt*, 48 Ill. 45; *Mitchell v. Pillsbury*, 5 Wis. 410. And see *Evans v. Saunders*, 3 Lea (Tenn.), 734.

<sup>9</sup> *Rundell v. Lakey*, 40 N. Y. 514; *Hutchins v. Moody*, 30 Vt. 656; 34 Vt. 433; *Long v. Moler*, 5 Ohio St. 272; *Overstreet v. Dobson*, 28 Ind. 256; *Peters v. Myers*, 22 Wis. 602; *Blossom v. Van Court*, 34 Mo. 394; 86 Am. Dec. 114.

far back as the time of the execution of the deed, they are not encumbrances.<sup>1</sup> There is no breach, however, if a portion of the land conveyed has been illegally sold for taxes.<sup>2</sup> The existence of a mortgage, a judgment, or any debt which has the effect of a lien upon the land, is an encumbrance.<sup>3</sup> To make a mortgage an encumbrance, it is essential that it should be a lien. If, therefore, for any cause, the mortgage is not a lien upon the premises, its existence is not a breach of the covenant.<sup>4</sup> It is held that taxes which are a lien, but not payable until afterward, are not an encumbrance within a covenant that there are no encumbrances suffered by the grantor.<sup>5</sup> This covenant is broken by the existence of a prior covenant to which the land is subject, that a particular fence shall be erected or maintained,<sup>6</sup> or that no intoxicating liquor shall be sold on the premises.<sup>7</sup> Where a daughter had, under the provisions of her father's will, the right of living in a part of a house, of which the whole was afterward conveyed by the residuary devisee, it was held that this paramount right of the daughter was a breach of the covenant against encumbrances made by such residuary devisee.<sup>8</sup> A restriction against building, unless it be done in a specified way, is also an encumbrance.<sup>9</sup> A covenant against encumbrances will extend to an outstanding lease.<sup>10</sup> Conditions of such a nature that their nonperformance may cause a forfeiture of the

<sup>1</sup> *Jackson v. Sassaman*, 5 Casey, 109; *Tull v. Royston*, 30 Kan. 617.

<sup>2</sup> *Cummings v. Holt*, 56 Vt. 384.

<sup>3</sup> *Norton v. Babcock*, 2 Met. 510; *Bean v. Mayo*, 5 Greenl. 94; *Shearer v. Ranger*, 22 Pick. 447; *Jones v. Davis*, 24 Wis. 229.

<sup>4</sup> *Case v. Erwin*, 18 Mich. 434.

<sup>5</sup> *Smith v. Eigerman*, 5 Ind. App. 269; 51 Am. St. Rep. 281. But see *Cochran v. Guild*, 106 Mass. 29; 8 Am. Rep. 296.

<sup>6</sup> *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633; *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550. But see *Parish v. Whitney*, 3 Gray, 516.

<sup>7</sup> *Hatcher v. Andrews*, 5 Bush, 561.

<sup>8</sup> *Jarvis v. Buttrick*, 1 Met. 480.

<sup>9</sup> *Roberts v. Levy*, 3 Abb. Pr., N. S., 311.

<sup>10</sup> *Fritz v. Pusey*, 31 Minn. 368.

estate are encumbrances.<sup>1</sup> So are covenants which run with the land. Thus, a covenant to maintain a division fence along the entire land between the premises conveyed and certain adjoining land, is an encumbrance.<sup>2</sup> An action on the covenant does not accrue until an ouster takes place, or the grantee has been compelled to extinguish the covenant to protect his estate.<sup>3</sup>

§ 908. **Water rights.**—A right to erect and maintain a dam has been held to be an encumbrance.<sup>4</sup> But where the owner of an upper and lower mill and dam had sold them to different persons, it was held that the existence of the lower dam, with the right of raising water by it to the point at which it stood at the time of the execution of the deed, was not a breach of the covenant against encumbrances, which the conveyance of the upper mill contained. "The right to the use of the water below the granted premises, as modified by the appropriation previously made for the lower mill, was not, in legal contemplation, an encumbrance, but rather in the nature of parcel of such lower estate."<sup>5</sup> Where a millpond caused by a dam on adjoining property had flooded a tract of land for a sufficient length of time to create a prescriptive right, it was held that this right of flooding was not an encumbrance.<sup>6</sup> It has been held that if a millowner above

<sup>1</sup> *Jenks v. Ward*, 4 Met. 412. But see *Estabrook v. Smith*, 6 Gray, 572; 66 Am. Dec. 445.

<sup>2</sup> *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550. And see *Bronson v. Coffin*, 108 Mass. 175, 187; 11 Am. Rep. 335; *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633. But see, also, *Parish v. Whitney*, 3 Gray, 516; *Plymouth v. Carver*, 16 Pick. 183. Such an agreement is construed as a covenant and not as a condition: *Hartung v. Witte*, 59 Wis. 285. But see *Floyd v. Clark*, 7 Abb. N. O. 136.

<sup>3</sup> *Hunt v. Marsh*, 80 Mo. 396; *Patterson v. Yancy*, 81 Mo. 379.

<sup>4</sup> *Ginn v. Heath*, 31 Me. 42.

<sup>5</sup> *Carey v. Daniels*, 8 Met. 466.

<sup>6</sup> *Kutz v. McCune*, 22 Wis. 628; 99 Am. Dec. 85. This case was decided on the principle that where property is notoriously subject at the time to some easement or servitude affecting its physical condition, purchasers take it subject to such rights. But this principle is not universally accepted.

certain land has the right to have a natural stream of water pass over land below, such a right is not an encumbrance.<sup>1</sup> This covenant relates to rights existing in the property conveyed in favor of parties other than the grantor, which, as against the grantor and his assigns, may be exercised upon and enforced against such property. Hence, where a millpond and surrounding lands, portions of which were sometimes flooded, are owned by one person, the idea of an easement does not attach to such use of the water, while such person owns all the land. The land with the stream and use of it as a water right constitute an entire estate, of which the dam and its use are parcel, and neither, it is held, can be considered an encumbrance within the meaning of the covenant.<sup>2</sup>

§ 909. **Right to use stairway in common.**—A deed was executed with covenants. The owner of adjoining premises had the right to use in common a stairway which was a part of the premises conveyed. An action was brought for a breach of the covenant against encumbrances, on the ground that the right to such use was a breach. It was contended before the court that, because the stairway was not in existence when the covenant giving the adjoining owner the use of the stairway was made, the encumbrance did not run with the land, but was simply a personal covenant between the immediate parties to it. The court, however, decided that, whatever the previous condition of things may have been, there was a valid subsisting encumbrance, in the nature of an easement, upon the premises, and that the covenant against encumbrances was clearly broken by the existence of this easement.<sup>3</sup>

<sup>1</sup> Prescott v. Williams, 5 Met. 429; 39 Am. Dec. 638.

<sup>2</sup> Harwood v. Benton, 32 Vt. 724. For other cases relative to water rights, see Dunklee v. Wilton R. R. Co., 4 Fost. (N. H.) 489; Gould v. Boston Co., 13 Gray, 442; Morgan v. Smith, 11 Ill. 194; Fitch v. Seymour, 9 Met. 462.

<sup>3</sup> McGowen v. Myers, 60 Iowa, 256.

§ 910. **Public highways as encumbrances.**—The decisions of the courts as to whether the existence of a public highway should be considered an encumbrance are conflicting, and in the same State, in some instances, the course of decision has been vacillating. , Decisions may be found to the effect that a public road is not an encumbrance.<sup>1</sup> And in Indiana, this was at first laid down as the law.<sup>2</sup> But subsequently this decision was overruled, and the court decided that a public road or street is an encumbrance.<sup>3</sup> And in most of the States,

<sup>1</sup> *Peterson v. Arthurs*, 9 Watts, 152; *Wilson v. Cochran*, 10 Wright, 233; *Whitbeck v. Cook*, 15 Johns. 483; 8 Am. Dec. 272; *Jordan v. Eve*, 31 Gratt. 1. In *Wilson v. Cochran*, *supra*, Woodward, C. J., speaking for the court, said: "Public roads are laid out in Pennsylvania by authority of the law, in pursuance of the authority of Penn, who established the custom of allowing to every grantee six acres in the hundred as a compensation for the roads that should thereafter be opened, and they confer on the public merely a right of passage, whilst the title to the soil is left undisturbed in the owner of the land through which they pass. A purchaser who sees such a road that has been used thirty years upon the land he is buying, has no right to consider it an encumbrance within the meaning of a covenant against encumbrances." In *Peterson v. Arthurs*, the court, per Mr. Justice Kennedy, observed: "Although a public highway, no doubt, is, in many instances, an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of a purchaser, who, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of t; and, consequently, if there be a public road or highway open and in use upon it, he must be taken to have seen it, and to have fixed in his own mind the price that he was willing to give for the land, with a reference to the road, either making the price less or more, as he conceived the road to be injurious or advantageous to the occupation or enjoyment of the land." See, also, *Ake v. Mason*, 101 Pa. St. 17; *Cincinnati v. Brachman*, 35 Ohio St. 289.

<sup>2</sup> *Scribner v. Holmes*, 16 Ind. 142.

<sup>3</sup> *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731. After the decision had been made, a petition for a rehearing was filed, and Chief Justice Buskirk, in delivering the opinion of the court in this petition, said: "It is insisted that our ruling is in direct conflict with *Scribner v. Holmes*, 16 Ind. 142. That case does not seem to have received much consideration. The opinion is as follows: '*Per curiam*.—This case was tried on May 16th, on which day a motion for new trial was overruled, exception taken, and leave given to file a bill of exceptions in thirty days. The bill was not filed until July 6th. That was too late. A legal public highway in actual use is not embraced in a general covenant against en-

the rule prevails that a public highway or road is an encumbrance, whose existence is a breach of the contract.<sup>1</sup>

cumbrances. It would be unreasonable that it should be. See Rawle on Covenants, 141, et seq.' The court having held in that case that the bill of exceptions did not constitute a part of the record, there was no question presented for decision, and all that was said in reference to what encumbrances were embraced in the covenants of a deed was *obiter*. Although what was said was in direct conflict with the well-considered case of *Medler v. Hiatt*, 8 Ind. 171, no reference was made to such case. Besides, the authorities cited do not sustain the ruling. Rawle, after referring to the cases of *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272, and *Peterson v. Arthurs*, 9 Watts, 152, says: 'But whatever weight may be due to these decisions, it cannot be denied that the current of authority has set strongly the other way, and the ruling in *Kellogg v. Ingersoll*, 2 Mass. 101, has been approved and sustained in nearly all the New England States, and it appears to be definitely settled there that a public highway does constitute at law a breach of this covenant. And in a very recent case in Illinois, these decisions have been approved and applied to the case where the encumbrance complained of was the right granted to a railway company to construct their road across the land conveyed.' Counsel also refer us to several cases in Pennsylvania in conflict with our ruling. In the original opinion, it was stated that the ruling had been uniform in that State in the opposite direction, and the reason of such ruling was stated. In *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85, the rule as it exists in Pennsylvania is approved and applied. On the other hand, our ruling is supported by many adjudged cases which were not cited in the original opinion, and which we now cite: *Herrick v. Moore*, 19 Me. 313; *Haynes v. Young*, 36 Me. 557; *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426; *Pritchard v. Atkinson*, 3 N. H. 335; *Butler v. Gale*, 27 Vt. 739; *Clark v. Estate of Conroe*, 38 Vt. 469; *Parish v. Whitney*, 3 Gray, 516; *Harlow v. Thomas*, 15 Pick. 66; *Sprague v. Baker*, 17 Mass. 586; *Giles v. Dugro*, 1 Duer, 331; *Hubbard v. Norton*, 10 Conn. 422; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426. In the last cases cited, the court, after referring to the rule as it exists in the New England States, says: 'Where the question has come up, the same doctrine has been approved in the Western States.' The court then reviews the cases in Illinois and Iowa, which are cited in the original opinion. . . . Then, as a highway or railway located and running over one's land is an encumbrance, and, to a greater or less degree, obstructs and encumbers the free use and enjoyment of the land, it follows that a person selling land thus encumbered, and covenanting that it is not, must be held to perform his covenants by its removal, or respond in damages. The seller may protect himself by excepting such encumbrances from the operation of the covenants of his deed." And see *Gillfillan v. Snow*, 51 Ind. 305, 308.

<sup>1</sup> *Haynes v. Young*, 36 Me. 557; *Butler v. Gale*, 1 Williams (Vt.), 742; *Herrick v. Moore*, 19 Me. 313; *Pritchard v. Atkinson*, 3 N. H. 335; *Parish v. Whitney*, 3 Gray, 516; *Hubbard v. Norton*, 10 Conn. 422; *Kellogg v.*



The existence of the liability of land to be assessed for street improvements is a breach of this covenant, contained in a deed which was executed between the time of improving the street and levying the assessment.<sup>1</sup>

Ingersoll, 2 Mass. 101. In *Butler v. Gale*, 1 Williams (Vt.), 742, the opinion of the court was delivered by Chief Justice Redfield, who, in the course of it, said: "In this country, where our tenures are strictly allodial, we are very much accustomed to consider that, if another really possesses any rights in our land, it is so far forth an encumbrance upon our title. Whether it be small or large in amount, whether it be a mortgage or a right to flow a portion or all of the land for a shorter or longer period during the year, or to draw water from a well or spring, or to water cattle at a brook, or to pass across the land on foot, or with teams, or to draw wood in winter only across the land, or to build and maintain a railway perpetually, or a highway, is certainly of no importance in determining the mere technical question of encumbrance or no encumbrance. And it can make no difference whether this right is notorious or not. If the question of an encumbrance were to be determined by its notoriety, or what is the same thing, by its being known to the purchaser, it must, to preserve consistency, be extended to all encumbrances. And, in that view, the grantee could not recover upon this covenant for paying a mortgage which he knew existed at the time of his purchase. But the contrary is perfectly well established, and in regard to these rights of way, if they existed only in a prior grant, and were not known to the grantee at the time of purchase, no one could claim that they did not constitute a breach of the covenant against encumbrances. And if the question whether a highway is an encumbrance upon land is to be determined by the fact of its being open and notorious, it resolves itself into this, whether it was the intention of the parties to treat it as an encumbrance or not. And the same rule should equally apply to a mortgage which the purchaser agreed to pay. But no lawyer will contend that in such a case, if the grantor covenants against all encumbrances, he is not liable to refund the money paid upon the mortgage by the grantee; that is, he is so liable at law. This is the written contract of the parties, and it cannot be set right in a court of law, where the writing is the exclusive evidence of the contract. But in such a case, the party must resort to a court of equity to restrain the other party from claiming indemnity against an encumbrance which was intended to be excepted from the covenant. And the same is no doubt true of a covenant against encumbrances so far as highways are concerned. Ordinarily, a court of equity would readily suppose the encumbrance of an existing highway or railway, or any other known and notorious right of a similar character, as a right to draw water from a spring, exercised by another at the time of the conveyance, could not have been intended to be indemnified against, and therefore should have been excepted from the operation of the covenant, and would, no doubt, so require the parties to treat the deed."

<sup>1</sup> *Fagan v. Cadmus*, 46 N. J. L. 441.

§ 911. **Right of way for railroad.**—On the same principle which declares that the existence of a public road is an encumbrance, it is held that, also, is a right of way for a railroad.<sup>2</sup> The supreme court of Illinois, after stating that a public highway is an encumbrance, says the same rule must apply to a right of way for a railroad, and observes: "When a purchaser obtains title by deed without covenant, he, of course, takes it subject to all defects and encumbrances it may be under at the time of the conveyance." One of the arguments that may be adduced in support of the proposition, that a right of way for a railroad should not be considered as an encumbrance within the meaning of this covenant, is the fact that such right of way must have been known to the parties. We have considered this point in a previous section, and found that knowledge of the existence of the encumbrance was no defense to an action upon the covenant. If the grantor sees proper to insert covenants in his deed, he does so voluntarily, and should, in case of a breach, suffer all the consequences which ordinarily follow. The reason which may induce a purchaser to insist on a covenant, is that he fears a failure of, or some defect in the title, and seeks to protect himself in this mode. The grantor may covenant for a good title when both he and the grantee know that the title is defective. As said by the court in Illinois: "If he were perfectly assured on these questions, he would seldom be tenacious in obtaining a covenant or warranty. If, then, a private or public way is an encumbrance, and we have seen that it is, it follows that, in principle, a turnpike or railway legally located, and running over a piece of land, upon the same ground and for the same reasons must be held to be an

<sup>2</sup> Barlow v. McKinley, 24 Iowa, 69; Beach v. Miller, 51 Ill. 206; 2 Am. Rep. 290; Van Wagner v. Van Nostrand, 19 Iowa, 422; Williamson v. Hall, 62 Mo. 405; Kellogg v. Malin, 50 Mo. 500; 11 Am. Rep. 426; s. c. 62 Mo. 429. See Haynes v. Young, 36 Me. 557; Giles v. Dugro, 1 Duer, 331; Harlow v. Thomas, 15 Pick. 66; Lamb v. Danforth, 59 Me. 322; 8 Am. Rep. 426.

encumbrance, as it in an equal or greater degree obstructs or encumbers the free use of the lands.”<sup>1</sup>

§ 912. **Right to light.**—One of the chief difficulties in harmonizing the decisions upon the subject of what things are to be considered encumbrances, consists in the fact that different courts take different views of the importance to be attached to easements that are known to the purchaser at the time of the conveyance. In the case of highways, some courts, in deciding them not to be encumbrances, have been led to this conclusion by the consideration that their existence was notorious. On the other hand, it has been stated that this circumstance was entitled to no weight, in determining what were encumbrances. On the ground that “the parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the then condition and state of the property, and if an easement to which it is subject be open and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property, as it was at the time, subject to such burthen,” in a case where the owner of two adjoining lots leased one of them for a term of years, and covenanted that the lessee should have the right to open certain windows, obtaining their light from the adjoining lot, and subsequently conveyed this adjoining lot, with a covenant of warranty against his acts, it was held that the existence of the windows, and the right to their preservation, was not a breach of the covenant.<sup>2</sup>

<sup>1</sup> *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290. Land for right of way was conveyed to a railroad company in consideration, among other things, of free passage for plaintiff at all times over the road, and the deed provided for a forfeiture on failure to comply with any condition. The road was conveyed to another, but no agreement was made in regard to plaintiff's having a pass. It was held that though the grantee furnished a pass for a while, plaintiff could not recover damages from it for failure to continue the pass, as his right of action was against the company to whom the conveyance was originally made: *Eddy v. Hinnant*, 82 Tex. 354.

<sup>2</sup> *James v. Jenkins*, 34 Md. 1; 6 Am. Rep. 300. “As the wall had been erected,” said the court, “and the lights therein were plainly to be seen

**§ 913. Purchaser's knowledge of encumbrance.**—It has sometimes been intimated that if the purchaser has notice of encumbrances at the time he takes his deed, that he should be deemed to take the land subject to them, and if he desires protection against them, they should be expressly mentioned in the covenant.<sup>1</sup> But notwithstanding some statements to the contrary, it seems to be settled by authority that the fact that encumbrances are known to the purchaser to exist at the time of the execution of the deed does not affect his right to recover on the covenant against encumbrances, unless they are excepted in terms from its operation.<sup>2</sup> "It is no answer to the purchaser's complaint to say it was his duty to search the record, and to have protected himself by some special

when the appellant purchased the property overlooked by them, it is but rational to conclude that he contracted with reference to that condition of the property, and that the price was regulated accordingly. . . . The grantor, by his covenant, warranted the premises as they were, and by no means intended to warrant against an existing easement, which was open and visible to the appellant, and over which the former had no power or control whatever."

<sup>1</sup> 2 Sugden on Vendors, 449. And see as to covenant of warranty, *Bennett v. Buchan*, 76 N. Y. 386.

<sup>2</sup> *Snyder v. Lane*, 10 Ind. 424; *Funk v. Voneida*, 11 Serg. & R. 112; 14 Am. Dec. 617; *Hubbard v. Norton*, 10 Conn. 422; *Lloyd v. Quimby*, 5 Ohio St. 265; *Suydam v. Jones*, 10 Wend. 185; 25 Am. Dec. 552; *Perkins v. Williams*, 5 Cold. 513; *Sargent v. Gutterson*, 13 N. H. 473; *Worthington v. Curd*, 22 Ark. 285; *Harlow v. Thomas*, 15 Pick. 70; *Medler v. Hiatt*, 8 Ind. 173; *Shanahan v. Perry*, 130 Mass. 460. A covenant against encumbrances covers those known as well as those unknown: *Burr v. Lancaster*, 30 Neb. 688; 27 Am. St. Rep. 438; *Clark v. Monroe*, 38 Vt. 469; *Butler v. Gale*, 27 Vt. 739; *Watts v. Fletcher*, 107 Ind. 391; 8 N. E. Rep. 111; *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731; *Quick v. Taylor*, 113 Ind. 540; 16 N. E. Rep. 588; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426; *Miller v. Desverges*, 75 Ga. 407; *Smith v. Eason*, 46 Ga. 316; *Prichard v. Atkinson*, 3 N. H. 335; *Fletcher v. Chamberlin*, 61 N. H. 438; *Foster v. Foster*, 62 N. H. 532; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Gerald v. Elley*, 45 Iowa, 322; *Barlow v. McKinley*, 24 Iowa, 69; *McGowen v. Myers*, 60 Iowa, 256; *Farrington v. Tourtelott*, 39 Fed. Rep. 738; *Barlow v. Delaney*, 40 Fed. Rep. 97; *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Long v. Moler*, 5 Ohio St. 271; *Doctor v. Darling*, 22 N. Y. Rep. 594; *Huyck v. Andrews*, 113 N. Y. 81; 10 Am. St. Rep. 432; *Butt v. Riffe*, 78 Ky. 252; *Hubbard v. Norton*, 10 Conn. 422; *Herrick v. Moore*, 19 Me. 313; *Haynes v. Young*, 36 Me. 557; *Lamb v. Danforth*, 59 Me. 322; 8 Am.

covenant against this specific encumbrance. It was no part of this case that he had actual notice, but if he had, it could make no difference."<sup>1</sup> It has been held, however, by a divided court, that a breach of the usual covenants found in a deed does not arise from the fact that a public road has been laid out across the land, as the grantee has constructive notice of this from the public records.<sup>2</sup> And it is also held that no breach of the usual covenants in a deed is caused by the existence of railways over the land at the time of its sale, the purchaser being presumed to have taken the land with knowledge of them.<sup>3</sup>

**§ 914. Parol evidence to exclude encumbrance from covenant.**—It is a well settled rule that parol evidence is inadmissible to contradict a written contract. Accordingly, where it is intended by the parties that a certain encumbrance is to be excluded from the general operation of the covenant, such fact should be mentioned in the deed. When both parties are cognizant of encumbrances existing on the land to be conveyed, this covenant is frequently made and accepted. The grantor may intend to discharge them from the purchase money, or to remove them at some future period, and the purchaser has a right to rely on the language of the covenant.<sup>4</sup> In some states, parol evidence is admissible to show that the plaintiff, at

Rep. 426; Kellogg v. Ingersoll, 2 Mass. 97; Parish v. Whitney, 3 Gray, 516; Sprague v. Baker, 17 Mass. 586; Harlow v. Thompson, 15 Pick. 66; Ladd v. Noyes, 137 Mass. 151. But see, as to a public road, Heymes v. Estey, 116 N. Y. 501; 15 Am. St. Rep. 421; Huyck v. Andrews, 113 N. Y. 81; 10 Am. St. Rep. 432; Bennett v. Keehn, 67 Wis. 154.

<sup>1</sup> Funk v. Voneida, 11 Serg. & R. 110; 14 Am. Dec. 617, per Duncan, J. See, also, Taylor v. Gilman, 25 Vt. 413; Dunn v. White, 1 Ala. 645; Morgan v. Smith, 11 Ill. 200; Grice v. Scarborough, 2 Spear, 649; 42 Am. Dec. 391; Barlow v. McKinley, 24 Iowa, 70; Van Wagner v. Van Nostrand, 19 Iowa, 427.

<sup>2</sup> Ake v. Mason, 101 Pa. St. 117.

<sup>3</sup> Smith v. Hughes, 50 Wis. 620.

<sup>4</sup> See, generally, McGowen v. Myers, 60 Iowa, 256; Burbank v. Pillsbury, 48 N. H. 483; 97 Am. Dec. 633; Long v. Moler, 5 Ohio St. 274; Harlow v. Thomas, 15 Pick. 70; Refeld v. Woodfolk, 22 How. 326; Keith

the time of the execution of the deed, agreed himself to discharge the encumbrance.<sup>1</sup> In a case in Missouri, the deed contained a covenant against encumbrances, and the purchaser having paid certain taxes, brought an action to recover the amount so paid. The court, however, permitted the defendant to show that the amount of the taxes was a portion of the consideration price, and that the purchaser agreed to assume their payment.<sup>2</sup> But while the rule is not universal, it is generally held that aside from the question of fraud or mistake, parol evidence is not admissible to show that a covenant against encumbrances, where no exception is contained in the deed itself, was not intended by the parties to apply to a particular encumbrance.<sup>3</sup> It has been held that the declarations of the grantor made before the execution of the deed, are admissible in evidence for the purpose of showing that the warranty was intended to cover certain liens or defects in title of which the grantee had knowledge.<sup>4</sup>

**§ 915. Comments.**—On purely equitable principles, it seems harsh to say that where there is a well-known easement or encumbrance, the covenant should embrace it. But if the rule which prohibits the introduction of parol evidence to vary or contradict a written agreement were departed from, disastrous consequences would result. It

*v. Day*, 15 Vt. 670; *Jaques v. Esler*, 3 Green Ch. 463; *Skinner v. Starnner*, 12 Harris, 123; *McLeod v. Skiles*, 81 Mo. 595; *Dunn v. White*, 1 Ala. 645; *Rawle on Covenants*, tit. 121.

<sup>1</sup> *Fitzer v. Fitzer*, 29 Ind. 468; *Pitman v. Conner*, 27 Ind. 337; *Allen v. Lee*, 1 Ind. 58; 48 Am. Dec. 352; *Sidden v. Riley*, 22 Ill. 111. See *Leland v. Stone*, 10 Mass. 459, afterward limited in the later case of *Spurr v. Andrew*, 6 Allen, 422.

<sup>2</sup> *Laudman v. Ingram*, 49 Mo. 212.

<sup>3</sup> *Harlow v. Thomas*, 15 Pick. 70; *Spurr v. Andrew*, 6 Allen, 422; *Townsend v. Weld*, 8 Mass. 146; *McKenna v. Doughman*, 1 Penn. 417; *Donnell v. Thompson*, 10 Me. 177; 25 Am. Dec. 216; *Collingwood v. Irwin*, 3 Watts, 306; *Batchelder v. Sturgis*, 3 Oush. 203; *Long v. Moler*, 5 Ohio St. 271. And see, also, *Van Wagner v. Van Nostrand*, 19 Iowa, 428; *Grice v. Scarborough*, 2 Spear, 649; 42 Am. Dec. 391; *Suydam v. Jones*, 10 Wend. 185; 25 Am. Dec. 552.

<sup>4</sup> *Skinner v. Moye*, 69 Ga. 476.

is safer to declare that the covenant against encumbrances shall apply to all encumbrances, whether known to exist or not, than it is to admit parol evidence to determine what were the unexpressed and secret intentions of the parties in each particular case. When it is once understood that this covenant means just what its language indicates, every encumbrance desired to be excluded from its operation can be excepted by express terms in the deed. Where the covenantor attempted to show that it was agreed, at the time the deed was executed, that the security of the covenantee should consist in the assignment of a certain judgment, and that the covenantor should incur no liability on his covenant, the court said: "It is impossible to avoid seeing that to admit such proof would not only be admitting evidence to contradict, but to alter and change most materially the character and effect of the deed. Instead of being a deed with covenant of general warranty, as it purports on its face, it would, by the operation of the evidence proposed to be given, become a deed, without any engagement whatever on the part of the grantor for the goodness of the title."<sup>1</sup> But if through fraud or mistake the deed does not contain the true agreement of the parties, it may be reformed in equity.<sup>2</sup>

**§ 916. Damages for breach of covenant against encumbrances.**—This covenant is considered to be one of indemnity. If the covenantee has not removed the encumbrance, it may be that he will never be disturbed by it. He may discharge the encumbrance, but if he does not do so the universal rule is that while it remains undischarged and he has suffered no actual injury, he is entitled to only nominal damages.<sup>3</sup> "The doctrine is

<sup>1</sup> *Collingwood v. Irwin*, 3 Watts, 306.

<sup>2</sup> *Busby v. Littlefield*, 11 Fost. (N. H.) 199; *Haire v. Baker*, 1 Seld. 360; *Stanley v. Goodrich*, 18 Wis. 505; *Taylor v. Gilman*, 25 Vt. 413; *Butler v. Gale*, 27 Vt. 744; *Metcalf v. Putnam*, 9 Allen, 99.

<sup>3</sup> *De La Vergne v. Norris*, 7 Johns. 358; 5 Am. Dec. 281; *Selleck v. Griswold*, 57 Wis. 291; *Reasoner v. Edmundson*, 5 Ind. 393; *Baldwin v. Munn*, 2 Wend. 405; 20 Am. Dec. 627; *Brady v. Spruck*, 27 Ill. 478.



well settled that in an action of covenant against encumbrances, if the plaintiff has extinguished the encumbrance, he is entitled to recover the amount paid for it; but if he has not bought it in, he is only entitled to nominal damages."<sup>1</sup> And the cost of extinguishing the encumbrance is always the measure of damages, irrespective of the value of the land or the purchase price.<sup>2</sup> Where an unexpired lease is the breach, the value of the occupation of the premises during the time for which the grantee has been deprived of their use is the measure of damages.<sup>3</sup>

§ 917. *Special injury.*—The rule just enunciated applies where there is a technical breach of the covenant by the existence of the encumbrance, but where it has not been

*Andrews v. Davison*, 17 N. H. 413; 43 Am. Dec. 606; *Mills v. Saunders*, 4 Neb. 190; *Brooks v. Moody*, 20 Pick. 574; *Bean v. Mayo*, 5 Greenl. 94; *Davis v. Lyman*, 6 Conn. 255; *Pitcher v. Livingston*, 4 Johns. 1; 4 Am. Dec. 229; *Robbins v. Arnold*, 11 Ill. App. 434; *Hall v. Dean*, 13 Johns. 105; *Randall v. Mallett*, 14 Me. 51; *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 246; *Snell v. Iowa Homestead Co.*, 59 Iowa, 701; *Wyman v. Ballard*, 12 Mass. 304; *Richardson v. Dorr*, 5 Vt. 20; *Eaton v. Lyman*, 30 Wis. 41; *Stewart v. Drake*, 4 Halst. 141; *Garrison v. Sandford*, 12 N. J. L. 261; *Braman v. Bingham*, 26 N. Y. 483; *Foote v. Burnett*, 10 Ohio, 317; 36 Am. Dec. 90; *Johnson v. Collins*, 116 Mass. 392; *Jenkins v. Hopkins*, 8 Pick. 348; *Cormings v. Little*, 24 Pick. 269; *Tufts v. Adams*, 8 Pick. 547; *Leffingwell v. Elliott*, 8 Pick. 457; 19 Am. Dec. 343; *Clark v. Swift*, 3 Met. 390; *Thayer v. Clemence*, 22 Pick. 490; *Patterson v. Stewart*, 6 Watts & S. 528; 40 Am. Dec. 586; *Willetts v. Burgess*, 34 Ill. 500; *Cheney v. City National Bank*, 77 Ill. 562; *Richard v. Bent*, 59 Ill. 38; 14 Am. Rep. 1; *Osgood v. Osgood*, 39 N. H. 209; *Smith v. Jefts*, 44 N. H. 482; *Willson v. Willson*, 25 N. H. 235; 57 Am. Dec. 320; *Standard v. Eldredge*, 16 Johns. 254; *Smith v. Ackerman*, 5 Blackf. 541; *Pomeroy v. Burnett*, 8 Blackf. 142; *Pillsbury v. Mitchell*, 5 Wis. 17; *Herrick v. Moore*, 19 Me. 813; *Clark v. Perry*, 30 Me. 151; *Runnells v. Webber*, 59 Me. 488; *Reed v. Pierce*, 36 Me. 455; 58 Am. Dec. 761; *Edington v. Nix*, 49 Mo. 134; *St. Louis v. Bissell*, 46 Mo. 157; *Funk v. Voneida*, 11 Serg. & R. 110; 14 Am. Dec. 617; *Beecher v. Baldwin*, 55 Conn. 419; 3 Am. St. Rep. 57; *Marsh v. Thompson*, 102 Ind. 272; *Sac. County Bank v. Hooper*, 77 Iowa, 435; *Harwood v. Lee*, 85 Iowa, 622; *Lane v. Richardson*, 104 N. C. 642; *Bradshaw v. Crosby*, 151 Mass. 235; *Johnson v. Collins*, 116 Mass. 392.

<sup>1</sup> *Pillsbury v. Mitchell*, 5 Wis. 17, 21, per Cole, J. See, also, *Price v. Deal*, 90 N. C. 290.

<sup>2</sup> *Walker v. Deaver*, 79 Mo. 664; *Morehouse v. Heath*, 99 Ind. 509.

<sup>3</sup> *Fritz v. Pusey*, 31 Minn. 368.

discharged, and no actual injury has resulted. But if the covenantee has been really injured, he may recover damages for such injury, notwithstanding the fact that the encumbrance continues undischarged. A good illustration of this principle is found in a case where there was a paramount mortgage having a number of years to run upon a piece of land, covenanted to be free from encumbrances, and the creditors of the covenantee believing that the property he held might not be sufficient to pay off the encumbrance and all his debts, began to seek the collection of their claims. The covenantee in consequence made an assignment, and the court held that if the land was sold by process of law for so much less than the value of the mortgage, a recovery could be had on the covenant for the full amount of the mortgage.<sup>1</sup>

**§ 918. Removal of encumbrance by purchase.**—Where the encumbrance has been removed or paid off by the covenantee, the rule is that he is entitled as damages for a breach of the covenant, the amount that he has paid for this end, if the amount was reasonable and fair.<sup>2</sup> “In the

<sup>1</sup> *Funk v. Voneida*, 11 Serg. & R. 110; 14 Am. Dec. 617. See *Braman v. Bingham*, 26 N. Y. 483. See, also, *Sewall v. Clarke*, 51 Cal. 227; *Levitsky v. Johnson*, 35 Cal. 41.

<sup>2</sup> *Grant v. Tallman*, 20 N. Y. 191; 75 Am. Dec. 384; *Stoddard v. Gage*, 41 Me. 287; *Brandt v. Foster*, 5 Iowa, 287; *Farnum v. Peterson*, 111 Mass. 148; *Brown v. Broadhead*, 3 Whart. 104; *Andrews v. Appel*, 22 Hun, 429; *Henderson v. Henderson*, 13 Mo. 151; *Kent v. Cantrall*, 44 Ind. 452; *Harlow v. Thomas*, 15 Pick. 66; *Snyder v. Lane*, 10 Ind. 424; *Rardin v. Walpole*, 38 Ind. 146; *Stambaugh v. Smith*, 23 Ohio St. 584; *Norton v. Babcock*, 2 Met. 516; *Baker v. Corbett*, 28 Iowa, 320; *Spring v. Chase*, 22 Me. 505; 39 Am. Dec. 595; *Garrison v. Sandford*, 12 N. J. L. 261; *Thayer v. Clemence*, 22 Pick. 490; *Chapel v. Bull*, 17 Mass. 213; *Davis v. Lyman*, 6 Conn. 255; *Batchelder v. Sturgis*, 3 Cush. 205; *Lane v. Richardson*, 104 N. O. 642; *Corbett v. Wrenn*, 25 Or. 305; *Barnhart v. Hughes*, 46 Mo. App. 318; *Beecher v. Baldwin*, 55 Conn. 419; 3 Am. St. Rep. 57; *Wadhams v. Swan*, 109 Ill. 46; *Bradshaw v. Crosby*, 151 Mass. 237; *Johnson v. Collins*, 116 Mass. 392; *Coburn v. Litchfield*, 132 Mass. 449; *Harrington v. Murphy*, 109 Mass. 299; *Smith v. Carney*, 127 Mass. 179; *Harwood v. Lee*, 85 Iowa, 622; *Kelsey v. Remer*, 43 Conn. 129; 21 Am. Rep. 638; *Smith v. Jeffs*, 44 N. H. 482; *Fagan v. Cadmus*, 46 N. J. L. 441; *Hartshorn v. Cleveland*, 52 N. J. L. 473.

absence of fraud," says Strong, J., "a party who has purchased real estate, and received a deed for it, containing a covenant that it is free from any encumbrance, and has subsequently paid off and discharged an encumbrance, may set off what has been paid by him against the amount due on any mortgage for the purchase money. In order to avail himself of such defense, however, he would be bound to prove either what had been paid by him was actually due, or that he had given notice to his vendor requiring that such vendor should pay off the encumbrance within a limited time, or that otherwise the purchaser would pay a specified amount. Some of the authorities lay down the rule that the purchaser may set off or recover the amount paid without any qualification; but it seems to me reasonable that a vendor who has been innocent of any fraud should have an opportunity to set himself right before he should be obliged to pay or allow more than the amount actually due. It is, I think, well settled that where the encumbrance has not been paid off by the purchaser of the land, and he has remained in quiet and peaceable possession of the premises, he cannot have relief against his contract to pay the purchase money, or any part of it, on the ground of defect of title. The reason is, that the encumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way; and then it would be inequitable that any part of the purchase money should be retained."<sup>1</sup>

**§ 919. Burden of proof.**—It does not follow that the price paid was the fair and reasonable value of the en-

<sup>1</sup> *Grant v. Tallman*, 20 N. Y. 191, 194; 75 Am. Dec. 384. See, also, *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456; *Eaton v. Tallmage*, 22 Wis. 502; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 Wis. 618; *Waldo v. Long*, 7 Johns. 173; *Reed v. Pierce*, 36 Me. 455; 58 Am. Dec. 761; *Kelly v. Low*, 18 Me. 244; *Wetmore v. Green*, 11 Pick. 462; *Dimmick v. Lockwood*, 10 Wend. 142; *Monahan v. Smith*, 19 Ohio St. 384; *Smith v. Dixon*, 27 Ohio St. 471; *Moseley v. Hunter*, 15 Mo. 322; *Guthrie v. Russell*, 46 Iowa, 269; 26 Am. Rep. 135; *Knadler v. Sharp*, 36 Iowa, 232; *Jenkins v. Hopkins*, 8 Pick. 346; *Smith v. Dixon*, 27 Ohio St. 471; *Morrison v. Underwood*, 20 N. H. 369; *Stanard v. Eldridge*, 16 Johns. 254. And see *Connell v. Boulton*, 25 Up. Can. Q. B. 444.

cumbrance. The covenantee is not entitled to the price that he has been compelled to pay, or has seen proper to pay, but only to this amount when he has fairly and reasonably paid it. It accordingly results that he has the burden of showing this fact. "It was incumbent on him to prove," said Chilton, J., in one of these cases, "in order to recover more than nominal damages, not only the amount paid, but that such payment was the reasonable value of the interest acquired. To hold that it was reasonable, from the bare fact of payment, is to assume as true the fact to be proved."<sup>1</sup>

**§ 920. When encumbrance cannot be removed.—**Where the encumbrance is of such a character, as a right of dower, or an easement, that it cannot be removed at the option of the grantor or grantee, damages are awarded for the injury that proximately is caused by the encumbrance.<sup>2</sup> If the encumbrance consists of a right of way over the land for the purpose of obtaining water from a spring thereon, damages should be awarded upon the assumption that just compensation should be made for the injury resulting from the continued existence of the easement.<sup>3</sup> The value of timber for the purposes of a farm at the time of the execution of the deed, will be taken as the amount of compensation to which the covenantee is entitled for an encumbrance, consisting of a prior grant of the timber with the right of entering to cut it during a future term.<sup>4</sup> If the encumbrance is a life estate, for the existence of which damages are sought, the purchaser

<sup>1</sup> *Anderson v. Knox*, 20 Ala. 156, 161. See, also, *Pate v. Mitchell*, 23 Ark. 590; 79 Am. Dec. 114; *Dickson v. Desire*, 23 Mo. 167; *Harlow v. Thomas*, 15 Pick. 69; *Lawless v. Collier*, 19 Mo. 480.

<sup>2</sup> *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 246; *Greene v. Creighton*, 7 R. I. 1; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426; *Hubbard v. Norton*, 10 Conn. 422; *Giles v. Dugro*, 1 Duer, 335; *Barlow v. McKinley*, 24 Iowa, 69; *Van Wagner v. Van Nostrand*, 19 Iowa, 427; *Butler v. Gale*, 27 Vt. 739; *Chapel v. Bull*, 17 Mass. 212; *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Batchelder v. Sturges*, 3 Cush. 205; *Harlow v. Thomas*, 15 Pick. 66.

<sup>3</sup> *Harlow v. Thomas*, 15 Pick. 66.

<sup>4</sup> *Cathcart v. Bowman*, 5 Pa. St. 317.

is entitled to compensation for the value of such estate for the time that he is deprived of the enjoyment of the property.<sup>1</sup> In the case of an outstanding lease, the purchaser may be allowed the annual value, or interest on the purchase money, during the length of time his enjoyment is suspended, or what would be a fair rent for the land.<sup>2</sup> Only nominal damages, however, can be recovered for the existence of a mere inchoate right of dower, because until the death of the husband no real damage can result.<sup>3</sup> The decrease in the market value of the land may usually be taken as a proper criterion by which to measure the damages caused by the existence of an easement.<sup>4</sup> If the covenant, however, is in the form of an agreement to pay and discharge the encumbrances, the covenantee, although he has not extinguished them, is entitled to recover the amount of the encumbrances.<sup>5</sup>

§ 921. **Covenant for quiet enjoyment.**—In the United States, the principal or sweeping covenant in deeds is

<sup>1</sup> *Christy v. Ogle*, 33 Ill. 295.

<sup>2</sup> *Rickert v. Snyder*, 9 Wend. 416; *Porter v. Bradley*, 7 R. I. 542. See *Grice v. Scarborough*, 2 Spear, 649; 42 Am. Dec. 391; *Moreland v. Metz*, 24 W. Va. 119; 49 Am. Rep. 246.

<sup>3</sup> *Sheaf v. O'Neil*, 9 Mass. 13; *Hazelrig v. Huston*, 18 Ind. 481; *Runnells v. Webber*, 59 Me. 488.

<sup>4</sup> *Williamson v. Hall*, 62 Mo. 405; *Giles v. Dugro*, 1 Duer, 331; *Kellogg v. Malin*, 62 Mo. 429. See *Burbanks v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633; *Bronson v. Coffin*, 108 Mass. 175; 11 Am. Rep. 335; *Wetherbee v. Bennett*, 2 Allen, 428.

<sup>5</sup> *Hogan v. Calvert*, 21 Ala. 199; *Booth v. Starr*, 1 Conn. 249; 6 Am. Dec. 233; *Gilbert v. Wyman*, 1 Comst. 550; *Gardner v. Niles*, 16 Me. 279; *Webb v. Pond*, 19 Wend. 423; *Ex parte Negus*, 7 Wend. 499; *Lithbridge v. Mytton*, 2 Barn. & Adol. 772; *Gennings v. Norton*, 35 Me. 308; *Lathrop v. Atwood*, 21 Conn. 123; *Ardesco Oil Co. v. N. A. Mining Co.*, 66 Pa. St. 381; *Monahan v. Smith*, 19 Ohio St. 384; *Dorsey v. Dashiell*, 6 Md. 204; *Scobey v. Finton*, 39 Ind. 275. But if the agreement is not to discharge the debt, but to save harmless from damage, the covenant becomes one of indemnity only: *Chase v. Hinman*, 8 Wend. 452; *Mann v. Eckford*, 15 Wend. 502; *Kip v. Brigham*, 6 Johns. 158; *Booth v. Starr*, 1 Conn. 244; 6 Am. Dec. 233; *Thomas v. Allen*, 1 Hill, 145; *Rockfeller v. Donnelly*, 8 Cowen, 623. And see *Stewart v. Clark*, 11 Met. 384; *Hodgson v. Bell*, 7 Term Rep. 97; *Sparkes v. Martindale*, 8 East, 593; *Holmes v. Rhodes*, 1 Bos. & P. 638; *Devol v. McIntosh*, 23 Ind. 529; *Warwick v. Richardson*, 10 Mees. & W. 284; *Churchill v. Hunt*, 3 Denio, 321.

considered to be the covenant of warranty; but in England, the covenant for quiet enjoyment occupies this place. It is the covenant generally inserted in leases, however. This covenant is generally expressed in this form: "And that the said premises shall at all times remain and be to the use of the said (purchaser), his heirs and assigns, and be quietly entered into and upon, and held and enjoyed, and the rents and profits thereof received by the said (purchaser), his heirs and assigns, accordingly, without any interruption or disturbance by him, the said (vendor), or any person or persons whomsoever."<sup>1</sup> Or in this form: "And that the said (purchaser), his heirs and assigns, shall and may at all times hereafter, freely, peaceably, and quietly enjoy the same without molestation or eviction of him, the said (vendor), or any person or persons whomsoever," and sometimes the clause is added, "lawfully claiming, or to claim the same by, from, or under him, them, or any of them, or by or with his or their acts, means, consent, default, privity, or procurement."<sup>2</sup> Where taxes had been assessed against property before the defendant owned it, it was held that this claim for taxes did not come within his covenant, "against the lawful claims and demands of all persons claiming by, through, or under him, and against no other claims and demands."<sup>3</sup> Where no legal right to use a sewer leading from the property conveyed to and across adjoining premises owned by another exists, an apparent right to such use is not a legal appurtenance within the meaning of a deed containing a covenant of warranty.<sup>4</sup> When, at the time of the execution of a deed conveying with a covenant of quiet enjoyment a tract of land, with a mill, a dam, and pond for supplying the water, "with the appurtenances," there were flush-boards on the dam, by the use of which the pond overflowed the land adjoining, of which fact the grantee at

<sup>1</sup> Davidson's Precedents and Forms of Conveyancing; Rawle on Covenants, tit. (4th ed.) 25; Housman's Handbook of Conveyancing, 1860.

<sup>2</sup> Rawle on Covenants, tit. (4th ed.) 28, 125.

<sup>3</sup> West v. Spaulding, 11 Met. 556.

<sup>4</sup> Green v. Collins, 86 N. Y. 246; 40 Am. Rep. 531.

time of purchase was ignorant, and the owner of the adjacent property recovered against the grantee for overflowing his land, thereby compelling him to reduce the height of the dam, an action may be maintained for breach of the covenant.<sup>1</sup>

§ 922. **Not broken by wrongful acts of others.**—By the covenant for quiet enjoyment, the grantor covenants only against the acts of those claiming by title. The covenantee has a remedy for any tortious disturbance by a trespasser, and it is said that he should not also have a remedy against his covenantor. Besides, to hold the grantor liable for a tortious disturbance of a stranger would be to make him liable for an act he could neither foresee nor prevent, and it would enable the covenantee to make a tortious disturbance by collusion with another. Then the covenant generally expresses that the covenantee shall lawfully enjoy the premises, and contains no express covenant against the tortious acts of others. For these reasons, it is settled that the tortious act of a stranger is not a breach of this covenant.<sup>2</sup> But all acts of the covenantor himself, or of others done at his command, whether they are wrongful or not, fall within this covenant.<sup>3</sup> But a covenant against the acts of a particular

<sup>1</sup> *Adams v. Conover*, 87 N. Y. 422; 41 Am. Rep. 381.

<sup>2</sup> *Underwood v. Birchard*, 47 Vt. 305; *Wilder v. Ireland*, 8 Jones (N. C.) 88; *Greenby v. Wilcocks*, 2 Johns. 1; 3 Am. Dec. 379; *Davis v. Smith*, 5 Ga. 274; 47 Am. Dec. 279; *Kelly v. Dutch Church*, 2 Hill, 111; *Hoppes v. Cheek*, 21 Ark. 585; *Meeks v. Bowerman*, 1 Daly, 100; *Beebe v. Swartwout*, 3 Gilm. 180; *Brick v. Coster*, 4 Watts & S. 499; *Yancey v. Lewis*, 4 Hen. & M. 395; *Noonan v. Lee*, 2 Black. 507; *Branger v. Manciet*, 30 Cal. 624; *Playter v. Cunningham*, 21 Cal. 232; *Folliard v. Wallace*, 2 Johns, 402; *Gleason v. Smith*, 41 Vt. 293; *Gardner v. Keteltas*, 3 Hill, 330; 38 Am. Dec. 637; *Surget v. Arighi*, 11 Smedes & M. 96; 49 Am. Dec. 46; *Spear v. Allison*, 8 Harris, 200; *Rantin v. Robertson*, 2 Strob. 336. See, also, *Wotten v. Hele*, 2 Saund. 178, n; *Lewis v. Smith*, 9 Man. G. & S. 610; *Nokes v. James*, Cro. Eliz. 675; *Schuykill R. R. v. Schmoele*, 7 Smith, P. F. 273; *Tisdale v. Essex*, Hob. 34; *Knapp v. Marlboro*, 34 Vt. 235; *Adams v. Conover*, 22 Hun, 424.

<sup>3</sup> *Sedgwick v. Hollenback*, 7 Johns. 376; *Crosse v. Young*, 2 Show. 425; *O'Keefe v. Kennedy*, 3 Cush. 325; *Mayor of New York v. Mabie*, 3 Kern. 156; 64 Am. Dec. 538; *Levitzky v. Canning*, 33 Cal. 299; *Seaman*



person, who is named in the covenant, will not be limited to his lawful acts.<sup>1</sup>

& *Browning's case*, 1 Leon. 157; *Cave v. Brookesby*, Jones, W. 360; *Lloyd v. Tomkies*, 1 Tenn. 671; *Andrew's case*, Cro. Eliz. 214; *Wotten v. Hele*, 2 Saund. 180, n; *Rawle on Covenants*, 135. In *Levitsky v. Canning*, 33 Cal. 299, where a covenant for quiet enjoyment was contained in a lease, Sanderson, J., in delivering the opinion of the court, said: "In its terms the covenant is very general, but no set formula is required; any language which expresses the intent to promise a quiet and peaceable enjoyment is sufficient, however brief it may be: *Rawle on Covenants*, 184. Whether it is broad enough to include strangers or not is immaterial, for the breach alleged was committed, if at all, by the lessor. The covenant for quiet enjoyment goes only to the possession, and hence the general rule that there is no breach unless there has been an eviction or an invasion, or disturbance of the possession: *Waldron v. McCarty*, 3 Johns. 473; *Picket v. Weaver*, 5 Johns. 120; *Sedgwick v. Hollenback*, 7 Johns. 380; *Whitbeck v. Cook*, 15 Johns. 485; 8 Am. Dec. 272; *St. John v. Palmer*, 5 Hill, 601. The eviction need not be by legal process: *Greenvault v. Davis*, 4 Hill, 644. Nor need there be a complete ouster or expulsion; an invasion, disturbance, or prevention, in whole or in part, will constitute a breach of the covenant: *Platt on Covenants*, 327. There must be some act of molestation, affecting, to his prejudice, the possession of the covenantee. Forbidding a tenant of the covenantee to pay him rent will not amount to a breach, if the tenant, notwithstanding, afterward pays the rent: *Witchcot v. Nine*, 1 Brownl. 81. But suppose the tenant had not paid the rent, but in consequence of the covenantor's prohibition had refused to pay? The case cited certainly implies very strongly that it would then have amounted to a breach, and there can be little doubt but that it would have been so declared. An act of molestation, whether committed by the covenantor himself or by another at his command, will alike amount to a breach of the covenant: *Seamon v. Browning*, 1 Leon. 157. But from the third count in the complaint it appears that the defendant had slandered the plaintiff's possession, giving out and pretending publicly that he had no right to the possession of the demised premises, and that he had brought two actions at law to recover the possession of the premises from the plaintiff and his tenants, under the pretense that his lease had expired. That in consequence of these actions brought against himself and his tenants, he had been put to great expense in defending the same, and his tenants had quit the premises, leaving the same vacant, and that he had been unable to rent the same to other parties, by reason of their

<sup>1</sup> *Nash v. Palmer*, 5 Maule & S. 374; *Foster v. Mapes*, Cro. Eliz. 212. And see *Rawle on Covenants*, 139; *Perry v. Edwards*, 1 Strange, 400; *Fowle v. Welch*, 1 Barn. & C. 29; *Patton v. Kennedy*, 1 Marsh. A. K. 389; 10 Am. Dec. 744; *Pence v. Duvall*, 9 Mon. B. 49. Another exception to the general rule is where the language of the covenant is "claiming or pretending to claim": *Chaplain v. Southgate*, 10 Mod. 383.

§ 923. **Exercise of right of eminent domain.**—The object of the covenant for quiet enjoyment is to indemnify the grantee for an eviction or disturbance caused by a defect in the grantor's title. But where the property is taken by the State by virtue of the power of eminent domain, the vendee is not deprived of his land because there was any defect in the vendor's title. The title that the grantee possesses is, presumably, undoubtedly good, and the State, by the exercise of this power, takes it away from him, making him just compensation. If the exercise of the right of eminent domain were a breach of the covenant for quiet enjoyment, the result would be that the grantee would receive full compensation from the State for his premises, and, at the same time, would have the right to recover from his grantor. But the covenantee can have no such right. His remedy is to look to the provisions of the legislature made to give him compensation for his land, and not to the covenant for quiet enjoyment. It is therefore settled that this covenant is not broken by the exercise of the right of eminent domain.<sup>1</sup>

doubts as to the lawfulness of his possession, caused by the acts of the defendant in bringing said suits, and publicly declaring that the possession of the plaintiff was unlawful, and that he had no legal right to let the premises. Was this a breach of his covenant within the rule already stated and the cases which we have cited? That it was does not admit of doubt. Those acts, if performed by him, were as much a molestation, disturbance, and invasion of the plaintiff's possession as a taking by the shoulders and a forcible eviction of the plaintiff's tenants would have been. The character of the act must be determined by the results which follow it, and, in view of the results which are alleged to have followed the acts of the defendant, there can be no question that he disturbed and interrupted the possession of the plaintiff to his injury, which is precisely what he had covenanted not to do."

<sup>1</sup> *Frost v. Earnest*, 4 Whart. 86; *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 122; *Bailey v. Miltenberger*, 7 Casey, 37; *Brimmer v. Boston*, 102 Mass. 19; *Folts v. Huntley*, 7 Wend. 210; *Dobbins v. Brown*, 2 Jones, 75. And see *Schuykill R. R. v. Schmoele*, 7 Smith, P. F. 273; *Dyer v. Wightman*, 16 Smith, P. F. 427. Where slaves have been sold with covenants, it has been held that they were not broken by emancipation: *Whitworth v. Carter*, 43 Miss. 61; *Osborn v. Nicholson*, 13 Wall. 655; *Phillips v. Evans*, 38 Mo. 305; *Fitzpatrick v. Hearne*, 44 Ala. 171; 4 Am. Rep. 128; *Mayfield v. Barnard*, 43 Miss. 270; *Walker v. Gatlin*, 12 Fla. 9; *Haskill v. Sevier*, 25 Ark. 152; *Willes v. Halliburton*, 25 Ark. 173;

§ 924. **Actual eviction.**—To operate as a breach of the covenant for quiet enjoyment, an eviction, as it is technically understood, is necessary. Legal process, however, is not essential to an eviction.<sup>1</sup> Where a grantee who has been evicted from part of the land brings an action upon the covenants, the fact that he took possession of the land described in the deed, and made no complaint as to the quantity of land conveyed, accepting the same as a fulfillment of the covenants alleged to be broken, is no defense to the action.<sup>2</sup> The covenantee is not obliged to withhold the possession from the rightful owner, nor to enter into litigation with the party who has the title. He may surrender his possession to the true owner, and this will be a sufficient ouster to enable him to recover on his covenant.<sup>3</sup> But to have this effect there must have been a hostile assertion of the paramount title.<sup>4</sup> In a case in Illinois, Mr. Justice Eaton, after adverting to the fact

*Porter v. Ralston*, 6 Bush, 655; *Hand v. Armstrong*, 34 Ga. 232; *Bass v. Ware*, 34 Ga. 386. In *Osborn v. Nicholson*, *supra*, Mr. Justice Swayne said: "Emancipation and eminent domain work the same result as regards the title and possession of the owner. Both are put an end to. Why should the seller be liable in one case and not in the other? We can see no foundation in reason or principle for such a claim."

<sup>1</sup> *Greenvault v. Davis*, 4 Hill, 645; *Parker v. Dunn*, 2 Jones (N. C.), 204; *Ware v. Lithgow*, 71 Me. 62; *Coble v. Wellborn*, 2 Dev. 390; *Leary v. Durham*, 4 Ga. 593; *Moore v. Frankenfield*, 25 Minn. 540. And see, also, *Grist v. Hodges*, 3 Dev. 200; *Booth v. Star*, 5 Day, 282; 5 Am. Dec. 149; *Funk v. Creswell*, 5 Clarke, 86; *Hagler v. Simpson*, Busb. 386.

<sup>2</sup> *Walterhouse v. Garrard*, 70 Ind. 400.

<sup>3</sup> *Axtel v. Chase*, 83 Ind. 546; *Fowler v. Poling*, 6 Barb. 168; *Drew v. Towle*, 10 Fost. (N. H.) 537; 64 Am. Dec. 309; *Loomis v. Bedel*, 11 N. H. 83; *Woodward v. Allen*, 3 Dana, 164; *Stone v. Hooker*, 9 Cowen, 157; *Haffey v. Birchetts*, 11 Leigh, 83; *Sterling v. Peet*, 14 Conn. 254; *Poyntell v. Spencer*, 6 Barr. 254; *Patton v. McFarlane*, 3 Pa. 425. And see *Slater v. Rawson*, 1 Met. 450, 455; *Steiner v. Baughman*, 2 Jones, 106; *Ferriss v. Harshea*, 1 Mart. & Y. 50; 17 Am. Dec. 782; *McDowell v. Hunter*, Dud. (Ga.) 4; *Blydenburgh v. Cotheal*, 1 Duer, 196; *Hamilton v. Cutts*, 4 Mass. 350; 3 Am. Dec. 222; *Leary v. Durham*, 4 Ga. 593, 606. But see *Beebe v. Swartwout*, 3 Gilm. 182, 183; *Hoy v. Taliaferro*, 8 Smedes & M. 541; *Dennis v. Heath*, 11 Smedes & M. 218; 49 Am. Dec. 51.

<sup>4</sup> *Knepper v. Kurtz*, 8 Smith, P. F. 480; *Sprague v. Baker*, 17 Mass. 590; *Dupuy v. Roebuck*, 7 Ala. 488.

that there might be a constructive eviction, as where the premises were, at the time of the execution of the covenant, in the possession of another, holding them under a paramount title, in which case the covenant would be broken as soon as made, proceeded to say: "But this is not the only case of constructive eviction which may now be considered as well settled by authority, and sustained by sound principles of morality and justice. If the covenantee be in the actual possession of the estate, he has the right to yield that possession to one who claims it under a paramount title, without resisting him by force or litigation; and this is sustained by the same reasons of justice and good government which are applicable to the first exception. This, however, is not to be understood as holding that the mere existence of a paramount title constitutes a breach of the covenant, or that it will authorize the covenantee to refuse to take possession when it is quietly tendered to him, or when he can do so peaceably, and then claim that by reason of such paramount title and his want of possession, the covenant is broken; nor will it justify him in abandoning the possession without demand or claim by the one holding the real title. His possession under the title acquired with the covenant is not disturbed by the mere existence of that title; and he has no right to assume that it ever will be, until he actually feels its pressure upon him. He must act in good faith toward his covenantor, and make the most of whatever title he has acquired, until resistance to the paramount title ceases to be a duty to himself or his covenantor."<sup>1</sup> The surrender must be made to the holder of the paramount title, and not to the vendor.<sup>2</sup> Where the land is unoccupied, and a covenant of warranty is executed, and the land remains vacant, and the owner of the true title, for the purpose of determining the title, commences actions of ejectment, the covenantee may waive the ob-

<sup>1</sup> Moore v. Vail, 17 Ill. 190. And see, also, Hagler v. Simpson, 1 Bush. 386.

<sup>2</sup> Axtel v. Chase, 83 Ind. 546.

jection of his nonoccupation to this form of action. He may try the title in these actions, and if judgment be awarded against him on the question of title, he may abandon any further claim to the land, and a breach of the covenant results.<sup>1</sup> Where a grantee has never secured, nor been able to secure, possession of the land conveyed, by reason of the existence of a paramount title in another, and possession by him, these facts are equivalent to an eviction.<sup>2</sup>

**§ 925. Purchaser has burden of proof if he yields to adverse title.**—If the purchaser refuses to yield possession to the paramount title until it has been established by a judgment, and the covenantor has been properly notified of the suit, then the validity of the paramount title is conclusively shown by the judgment or decree when introduced in evidence.<sup>3</sup> But if he elects to yield to the paramount title before it has been judicially established, he does so at his peril. He has, in such a case, the burden of proof when attempting to recover from his covenantor, and must clearly establish the adverse title which he has thus recognized.<sup>4</sup> “While he is not bound to contest where the contest would be hopeless, or resist where resistance would be wrong, yet always where he yields without a contest or a resistance, he must take upon himself the burden of showing that the title was paramount, and that he yielded the possession to the pressure of that title. Whenever he does yield quietly, he does so at his peril.”<sup>5</sup>

<sup>1</sup> *Allis v. Nininger*, 25 Minn. 525.

<sup>2</sup> *Blondeau v. Sheridan*, 81 Mo. 545.

<sup>3</sup> *Miner v. Clark*, 15 Wend. 427; *Bridger v. Pierson*, 45 N. Y. 603; *Wilson v. McElwee*, 1 Strob. 65; *Middleton v. Thompson*, 1 Spear, 67.

<sup>4</sup> *George v. Putney*, 4 Cush. 355; 50 Am. Dec. 788; *Callis v. Coghill*, 9 Lea (Tenn.), 137; *Hamilton v. Cutts*, 4 Mass. 350; 3 Am. Dec. 222; *Thomas v. Stickle*, 32 Iowa, 76; *Stone v. Hooker*, 9 Cow. 157; *Peck v. Hensley*, 20 Tex. 678; *Greenvault v. Davis*, 4 Hill, 643; *Witty v. Hightower*, 12 Smedes & M. 481.

<sup>5</sup> *Moore v. Vail*, 17 Ill. 190, per Eaton, J.

§ 926. **Comments.**—This rule is obviously a reasonable one. The covenantor must, certainly, have an opportunity of contesting the validity of the title alleged to be paramount. Where the covenantee is sued, and the covenantor is notified and thus enabled to defend, it is his own fault if he does not do so, and he ought to be bound by the judgment. But where the covenantee yields possession to what he is pleased to suppose is a superior title, he should be compelled to make out that title with as great a degree of particularity as if he were suing for the possession of the premises.

§ 927. **Premises in possession of another.**—If at the time the conveyance is executed the premises are in the possession of a person other than the grantor, claiming by a paramount title, the covenant for quiet enjoyment or warranty is broken at once by this very fact.<sup>1</sup> If this were not so, the only redress which the covenantee could have, would be either to become a trespasser by entering or to bring a needless suit. It is therefore settled law, that there is an eviction *eo instanti*, if the premises are actually in the possession of a third person, claiming under a paramount title at the time the covenant is made. Still, some decisions may be found to the contrary, which hold or countenance the idea that the covenantee in a case of this kind cannot recover on the covenant for quiet enjoyment.<sup>2</sup> The possession, however,

<sup>1</sup> *Murphy v. Trice*, 48 Mo. 250; *Grist v. Hodges*, 3 Dev. 200; *Russ v. Steele*, 40 Vt. 315; *Duvall v. Oraig*, 2 Wheat. 62; *Park v. Bates*, 12 Vt. 381; 36 Am. Dec. 347; *Clark v. Conroe*, 38 Vt. 475; *Phelps v. Sawyer*, 1 Aiken, 318; *Noonan v. Lee*, 2 Black. 507; *Barnett v. Montgomery*, 6 Mon. 328; *Curtis v. Daering*, 12 Me. 501; *Blanchard v. Blanchard*, 48 Me. 174; *Caldwell v. Kirkpatrick*, 6 Ala. 60; 41 Am. Dec. 36; *Cummins v. Kennedy*, 3 Litt. 123; 14 Am. Dec. 45; *Loomis v. Bedel*, 11 N. H. 74; *Small v. Reeves*, 14 Ind. 164; *Rea v. Minkler*, 5 Lans. 296; *University of Vermont v. Joslyn*, 21 Vt. 522; *Wilder v. Ireland*, 8 Jones (N. O.), 87. And see *Randolph v. Meeks*, Mart. & Y. 58; *Miller v. Halsey*, 2 Green, 59; *Playter v. Cunningham*, 21 Cal. 229; *Witty v. Hightower*, 12 Smedes & M. 478; *Banks v. Whitehead*, 7 Ala. 83.

<sup>2</sup> *St. John v. Palmer*, 5 Hill, 601; *Kortz v. Carpenter*, 5 Johns. 120; *Day v. Chism*, 10 Wheat. 452. See *Holder v. Taylor*, Hob. 12.

must be under an actually paramount title, and not merely an adverse possession.<sup>1</sup>

§ 928. **Purchase of paramount title.**—As has been observed, the purchaser may surrender possession to the owner of the paramount title, and this is an eviction, which entitles him to a recovery on his covenant. But he may also purchase the paramount title, in a proper case, without yielding possession, and be entitled to recover from his covenantor.<sup>2</sup> In a case in California, Mr. Justice Temple observed, after an examination of a number of cases: “The true rule deducible from the recent cases is, that the covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title. Nor is it necessary that the paramount title should have been established by a judgment before the covenantee will be authorized to surrender the possession. It is enough that the true owner asserts his title, and demands the possession. If it is his right to have possession, it certainly is the duty of the covenantee to surrender it to him. The covenant is for quiet possession, and against a rightful eviction. To constitute a breach of this covenant, it cannot be required that the covenantee should maintain a wrongful possession, and subject himself to be treated as

<sup>1</sup> *Beebe v. Swartwout*, 3 Gilm. 183; *Phelps v. Sawyer*, 1 Aiken, 57; *Rindskopf v. Farmers' Loan Co.*, 58 Barb. 49; *Jenkins v. Hopkins*, 8 Pick. 350; *Moore v. Vail*, 17 Ill. 185. The owner of wild and uncultivated lands is considered in possession, on the ground that the legal seisin carries with it the possession, provided that they are not, at the time, in the actual adverse possession of another: *Proprietors of Kennebeck v. Call*, 1 Mass. 484; *Bush v. Bradley*, 4 Day, 306; *Van Brunt v. Schenck*, 11 Johns. 385; *Mather v. Trinity Church*, 3 Serg. & R. 514; 8 Am. Dec. 663.

<sup>2</sup> *Turner v. Goodrich*, 26 Vt. 709; *Kansas Pacific Ry. Co. v. Dunmeyer*, 24 Kan. 725; *White v. Whitney*, 3 Met. 81; *Sprague v. Baker*, 17 Mass. 586; *Bemis v. Smith*, 10 Met. 194; *Stewart v. Drake*, 4 Halst. 139; *Estabrook v. Smith*, 6 Gray, 572; 66 Am. Dec. 445; *Kelly v. Low*, 18 Me. 244; *Cole v. Lee*, 30 Me. 392; *Haffey v. Birchette*, 11 Leigh, 88; *Claycomb v. Munger*, 51 Ill. 374; *Gunter v. Williams*, 44 Ill. 572; *Whitney v. Dinsmore*, 6 Cush. 124.



a trespasser. The object of a suit by the true owner would be to compel the covenantee to do that which he ought to have done without suit. It could not have been contemplated by the parties to the covenant that the covenantee should refuse to do what the law enjoins upon him as a duty. Nor can we perceive how the covenantor would be benefited by an eviction under a judgment. It was never considered necessary that the covenantor should have notice of the pendency of the suit. The judgment might be obtained without any real trial of the merits of the title; and, besides, in the action upon the covenant, it is incumbent upon the plaintiff to establish that the title to which he has submitted is a paramount title. Although there must be an eviction, it is not necessary that there should be an actual dispossession of the grantee. If the paramount title is so asserted that he must yield to it or go out, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach. He then no longer claims under his former title. So far as that title is concerned, he has been evicted, and is in under the paramount title.”<sup>1</sup> A mortgagee threatened to sue the purchaser of the land, whose deed contained covenants of warranty and quiet enjoyment, and to prevent a suit, the purchaser paid the amount of the mortgage. The court said: “The plaintiff has been disturbed in the enjoyment of his possession, and he has been compelled to purchase in another title for his own security, which we think very clearly has been a lawful interruption, and a breach of the covenant of quiet enjoyment.”<sup>2</sup> This is believed to be the general rule supported by the weight of authority, although deci-

<sup>1</sup> In *McGary v. Hastings*, 39 Cal. 360, 366, 2 Am. Rep. 456, citing *Sugden on Vendors*, 745, and note; *Lomis v. Bedell*, 11 N. H. 74; *Hamilton v. Cutts*, 4 Mass. 349; 3 Am. Dec. 222; *Turner v. Goodrich*, 26 Vt. 709; *Sprague v. Baker*, 17 Mass. 586; *Rawle on Covenants*, 278, et seq., and cases cited; *Noonan v. Lee*, 2 Black, 507; *Funk v. Cresswell*, 5 Clarke, 86; *Brady v. Spurck*, 27 Ill. 478; *Stewart v. Drake*, 4 Halst. 139.

<sup>2</sup> *Sprague v. Baker*, 17 Mass. 590. See, also, *Harding v. Larkin*, 41 Ill. 422; *McConnell v. Downs*, 48 Ill. 271.

sions may be found which countenance or uphold a different doctrine.<sup>1</sup>

<sup>1</sup> Thus, in *Waldron v. McCarty*, 3 Johns. 471, a demurrer was interposed to a complaint which alleged that the premises were encumbered with a mortgage at the time the deed to plaintiff was executed; that afterward they were sold under a decree of foreclosure of the mortgage, and the plaintiff had been compelled to purchase them to prevent his ouster. The demurrer was sustained on the ground, as stated by the court, that "the covenant for quiet enjoyment has reference merely to the undisturbed possession, and not to the grantor's title." The court further said in its opinion, per Spencer, J: "From precedents, and as no authority has been shown that the covenant for quiet enjoyment is broken by any other acts than an entry and eviction, or a disturbance of a possession itself, we are of opinion that the demurrer is well taken." See, also, *Witty v. Hightower*, 12 Smedes & M. 478; *Hannah v. Henderson*, 4 Ind. 174; *Reasoner v. Edmundson*, 5 Ind. 393; *Burrus v. Wilkinson*, 31 Miss. 537; *Hunt v. Amidon*, 1 Hill, 147.

The case of *Waldron v. McCarty*, 3 Johns. 471, has been severely criticised. In *McGary v. Hastings*, 39 Cal. 360, 364; 2 Am. Rep. 456, it is said: "The principal question involved in this appeal, is whether the acts set out in the complaint constitute a breach of the covenant of quiet enjoyment. The defendant contends that there must have been an actual eviction by a title paramount, under the judgment of a competent court. Many early cases, especially in the State of New York, seem to sustain this view, and two cases are cited from our own reports. The first is the case of *Fowler v. Smith*, 2 Cal. 39. That was an attempt to resist the payment of purchase money for premises conveyed, without special warranty, prior to the adoption of the common law in this State, and it was claimed that by the civil law certain covenants were implied. Justice Murray, in discussing the question, said that no covenants were implied, except those for quiet possession, and that to constitute a breach of that covenant, there must be an eviction under a judgment of a competent court, founded upon a paramount title. He relies upon the case of *Waldron v. McCarty*, 3 Johns. 471. In that case, there was a foreclosure and sale of the premises, under a mortgage which existed at the time of the covenant. The covenantee purchased at this sale, and brought suit upon his covenant. The court held that there had been no eviction. It was not necessary in that case to hold that eviction must, in all cases, be by legal process. This is a leading case upon that side of the question, and was followed by several others in that State. When understood, however, as establishing the general proposition that there must be an actual eviction under a judgment, these cases are contrary to the more recent decisions of that State, as we shall presently show. The other case from our reports is *Norton v. Jackson*, 5 Cal. 262. It was a suit for the purchase money, and was resisted on the ground that there had been a breach of covenant of warranty, which for all the purposes of this case is identical with the covenant for quiet enjoyment. The purchaser was still in possession. Mr. Justice Heydenfeldt, in delivering the

§ 929. **Redemption on tax sales.**—In a case in New York, a deed was executed for certain land, with a covenant for quiet enjoyment. A portion of it had been before the execution of the deed sold for unpaid taxes.

opinion of the court, says: 'There is no breach of the covenant without eviction, because there would be no correct measure of damages. It would be a hardship to allow the purchaser to remain in possession, and recover the purchase money also.' In this case, there had been no eviction, either actual or constructive; the purchaser was still in possession under the title of his covenantor, and no question can be raised as to the correctness of the decision. The broad statement in the conclusion of the opinion, that there must be an eviction, by process of law, cannot be sustained by authority, either in this country or in England: *Copp v. Wellburn*, 2 Dev. 390; *Foster v. Pierson*, 4 Lev. 617; *Stewart v. Drake*, 4 Halst. 141; *Rawle on Covenants*, 242. Indeed, there are many cases where an eviction without process of the law has always been considered a breach of the covenant, as in the case where the true owner at common law had the right to enter without suit, and where the covenantee was never able to obtain possession of the granted premises which were in possession of the owner of the paramount title. The case of *Waidron v. McCarty*, as understood, is contrary to the doctrine laid down in *Green-vault v. Davis*, 4 Hill, 643. In that case Mr. Justice Bronson says: 'There are some *dicta* in the books that there must be an eviction by process of law, but I have met with no case where it was so adjudged.' And again: 'Upon principle, I can see no reason for requiring an eviction by legal process. Whenever the grantee is ousted of possession by one having a lawful right to the property paramount to the title of the grantor, the covenants of warranty and for quiet enjoyment are broken, and the covenantee may sue. . . . When the grantee surrenders or suffers the possession to pass from him without a legal contest, he takes upon himself the burden of showing that the person who entered had a title paramount to that of his grantor. But there is no reason why such surrender, without the trouble and expense of a lawsuit, should deprive him of a remedy on the covenant. The grantor is not injured by such an amicable ouster. On the contrary, it is a benefit to him, for he thus saves the expenses of an action against the grantee to recover the possession. It may be inferred in this case that the premises were unoccupied. Blodget then entered and still holds the land. This was an ouster or disseisin of the plaintiff, and he is well entitled to an action on the defendant's covenant.' In the case of *Fowler v. Poling*, 6 Barb. 165, Mr. Justice Edmunds, after reviewing the decisions in that State, says: 'From these conflicting authorities, I deduce the true rule in this State to be that there must be an actual disturbance of the possession; and where the covenantee is rightfully out of possession, either by due process of law, or by an entry of the rightful owner, or by a surrender to one having a paramount title, there is an eviction, the covenant is broken, and an action will lie.'"

In *Brown v. Dickerson*, 2 Jones, 372, it is said by Burnside, J: "The

On the last day for the redemption of the land the purchaser paid the amount of taxes and accruing costs. The plaintiff brought an action on his covenant, but it was held that in the absence of a covenant against encumbrances the plaintiff could not acquire a claim against the defendant by making a voluntary payment without the defendant's request.<sup>1</sup> "The plaintiffs' covenant for quiet enjoyment," said Greene, J., "has never been broken, for

rule, as settled in *Waldron v. McCarty*, 3 Johns. 471, has not met the approbation of the profession in many States of this Union. It is too technical, and puts a grantee to unnecessary expense and trouble, and has been properly overruled in many of the courts."

In *Loomis v. Bedel*, 11 N. H. 74, the opinion was delivered by Parker, O. J., who said: "It is well settled that an entry under the paramount title amounts to a breach of a covenant of warranty; and the grantee may, upon demand, surrender the land to a claimant having a good title, and resort to his action: *Hamilton v. Cutts*, 4 Mass. 349; 3 Am. Dec. 222. But in *Waldron v. McCarty*, 3 Johns. 471, where there was an outstanding mortgage at the time of the conveyance to the plaintiff, and the premises were afterward sold upon the mortgage in pursuance of a decree of the court of chancery, and purchased by the plaintiff, who then brought his action upon the covenant of warranty in his deed, the court held that an entry and expulsion were necessary, and that there was no sufficient eviction or disturbance of the possession. In our opinion, this is carrying the principle too far. If the claimant holding the paramount title should enter upon the land, and the grantee should thereupon yield up the possession, he would immediately have a right of action upon the covenant of warranty in his deed; and this right would not be barred or forfeited should he forthwith purchase the premises from the claimant, to whose superior title he has thus yielded the possession. He might, on such repurchase, immediately re-enter into the possession, and still maintain his action on the covenant. If, instead of this formality, he yields to the claims of a paramount title, and purchases without an actual entry of the claimant under it, where is the substantial difference? For all practical purposes his title under the grant to which his covenant is attached, and under which he originally entered, is as much defeated in the one case as in the other. He is, in fact, dispossessed, so far as that title is concerned. He is still in possession, but he is so under another title, adverse and paramount to his former one; and his purchase is, therefore, equivalent to an entry of the claimant. It is an ouster by his consent, and a re-entry by himself under the superior title without going through what would be, at best, a mere formality, where, conscious of the defect of the title under which he originally entered, he chooses to yield peaceably to the assertion of a better title and to purchase it."

<sup>1</sup> *McCoy v. Lord*, 19 Barb. 18.

the reason that there never was any eviction. . . . And as they had no covenant against encumbrances, they had no right to pay them voluntarily, and without any request on the part of the defendant, and charge him with such payment. It is no answer to say that it would be a hardship for the plaintiffs to be compelled to wait until they were evicted, and then sue for the purchase money, and lose the enhanced value of the land and improvements. But for the covenant for quiet enjoyment they could not even recover the purchase money in a case free from fraud; and if they desired a remedy adequate to other contingencies they should have provided for it by appropriate covenants."<sup>1</sup> But if, by statute, one form of covenant is made to include them all, the grantee may, of course, pay off a tax on the land, and recover the amount paid on his covenant.<sup>2</sup>

§ 930. **Covenant for further assurance.** — This covenant which, however, is seldom used in the United States, is defined as "one by which the covenantor undertakes to do such reasonable acts, in addition to those already performed, as may be necessary for the completion of the transfer made, or intended to be made, at the requirement of the covenantee. It relates both to the title of the vendor and the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts for supplying any defects in the former, as to remove all objections to the sufficiency and security of the latter."<sup>3</sup> The acts which under this covenant the covenantor will be required to perform, must be necessary and practicable.<sup>4</sup>

§ 931. **Covenant of warranty.** — This covenant, which is considered the broadest and most effective, and is the one in general use, is equivalent to a covenant for quiet

<sup>1</sup> McCoy v. Lord, *supra*. But see Hall v. Dean, 13 Johns. 105.

<sup>2</sup> Funk v. Cresswell, 5 Clarke, 91.

<sup>3</sup> Bouv. Law Dict. tit. Covenant for Further Assurance; Platt on Covenants, 341.

<sup>4</sup> Gwynn v. Thomas, 2 Gill & J. 420; Warn v. Beckford, 7 Price, 550; Pet and Cally's case, 1 Leon. 304.

enjoyment.<sup>1</sup> It is "an assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title."<sup>2</sup> The covenant is extinguished by a reconveyance to the grantor before a breach, and a new conveyance will not revive it in the absence of a new express covenant.<sup>3</sup> The covenant does not extend to claims which possess no legal foundation.<sup>4</sup> Where a deed purports to convey only the right, title, and interest of the grantor, the scope of the covenant of warranty may be limited by the subject matter of the conveyance.<sup>5</sup> Laches in bringing suit does not commence until the party has been damnified.<sup>6</sup>

**§ 932. Breach of covenant of warranty.**—As the covenant of warranty is considered tantamount to that

<sup>1</sup> *Fowler v. Poling*, 2 Barb. 303; 6 Barb. 165; *Emerson v. Proprietors*, 1 Mass. 464; 2 Am. Dec. 34; *Bostwick v. Williams*, 36 Ill. 70; 85 Am. Dec. 385; *Athens v. Nale*, 25 Ill. 193; *Rea v. Minkler*, 5 Lans. 196. See *Williams v. Wetherbee*, 1 Aiken, 240; *Dobbins v. Brown*, 2 Jones, 75; *Russ v. Steele*, 40 Vt. 310. This section was cited with approval in *Reynolds v. Shaver*, 59 Ark. 299; 43 Am. St. Rep. 36.

<sup>2</sup> Bouv. Law Dict. tit. Cov. War. See *Moore v. Lanham*, 3 Hill (S. C.), 304; *Rindskopf v. Farmers' Loan Co.*, 58 Barb. 36; *Hull v. Hull*, 35 W. Va. 155; 29 Am. St. Rep. 800; 13 S. E. Rep. 49; *Adams v. Ross*, 30 N. J. L. 510; 82 Am. Dec. 237.

<sup>3</sup> *Brown v. Metz*, 33 Ill. 339; 85 Am. Dec. 277.

<sup>4</sup> *Gleason v. Smith*, 41 Vt. 296.

<sup>5</sup> *Allen v. Holton*, 20 Pick. 458; *Blanchard v. Brooks*, 12 Pick. 47; *Adams v. Ross*, 1 Vroom, 510; 82 Am. Dec. 237; *Raymond v. Raymond*, 10 Cush. 134; *Wight v. Shaw*, 5 Cush. 56; *Sweet v. Brown*, 12 Met. 175; 45 Am. Dec. 243; *Brown v. Jackson*, 3 Wheat. 452; *Hoxie v. Finney*, 16 Gray, 332; *Van Rensselaer v. Kearney*, 11 How. 325; *McNear v. McComber*, 18 Iowa, 12; *Merritt v. Harris*, 102 Mass. 328; *Blodgett v. Hildreth*, 103 Mass. 488; *Bates v. Foster*, 59 Me. 157; 8 Am. Rep. 406. In *Bates v. Foster*, 59 Me. 157, 8 Am. Rep. 406, the holder of an equity of redemption granted to him by another, conveyed the estate and title which his grantor had given him, by metes and bounds, with covenants of warranty. It was held that his covenant did not warrant title against the mortgage. In a case where property was conveyed by the use of the words "grant, bargain, and sell," and the deed contained a covenant "to warrant and defend the title to the conveyed premises against the claim of every person whomsoever," it was held that an action for breach of covenant would not lie because of the existence of an outstanding deed of trust on the land: *Koenig v. Branson*, 73 Mo. 634.

<sup>6</sup> *Post v. Campau*, 42 Mich. 90.

for quiet enjoyment, what is a breach of the latter is also a breach of the former, and therefore something equivalent to an eviction must occur to operate as a breach of this covenant.<sup>1</sup> The effect of full covenants of warranty is not to be limited by a subsequent clause of ambiguous signification, and which may be construed as an affirmation of the previous recitals.<sup>2</sup> The covenant, however, is not broken by the act of a mere stranger having no valid title, though he may pretend to have one.<sup>3</sup> But the existence of a public or private way,<sup>4</sup> or the right to use a wall situated on the premises for a party wall, are breaches of the covenant.<sup>5</sup> And, generally, what in the case of a covenant for quiet enjoyment is considered an eviction, is deemed such under a covenant of warranty. If a deed contains a covenant of general warranty, and at the time it is made another has actual possession of the premises, holding them by a paramount title, an eviction occurs

<sup>1</sup> *Scott v. Kirkendall*, 88 Ill. 465; 30 Am. Rep. 562; *Townsend v. Morris*, 6 Cowen, 126; *Caldwell v. Kirkpatrick*, 6 Ala. 60; 41 Am. Dec. 36. See *Green v. Collins*, 20 Hun, 474.

<sup>2</sup> *Locke v. White*, 89 Ind. 492.

<sup>3</sup> *Hannah v. Henderson*, 4 Ind. 174; *Hale v. New Orleans*, 13 La. Ann. 499; *Loughran v. Ross*, 45 N. Y. 792; 6 Am. Rep. 173. See *Kincaid v. Brittain*, 5 Sneed, 124; *Norton v. Jackson*, 5 Cal. 262; *Gleason v. Smith*, 41 Vt. 293.

<sup>4</sup> *Butt v. Riffe*, 78 Ky. 352; *Russ v. Steele*, 40 Vt. 310; *Haynes v. Young*, 36 Me. 561; *Harlow v. Thomas*, 15 Pick. 66.

<sup>5</sup> *Lamb v. Danforth*, 59 Me. 324; 8 Am. Rep. 426. See *Hendricks v. Stark*, 37 N. Y. 106; 93 Am. Dec. 549. The right in another to draw water from the premises is a breach: *Day v. Adams*, 42 Vt. 510; *Clark v. Conroe*, 38 Vt. 469. So is suffering taxes to remain unpaid: *Rinehart v. Rinehart*, 91 Ind. 89. Where a deed purports to convey only the right, title, and interest of the grantor, a general covenant will not enlarge the conveyance: *Young v. Clippinger*, 14 Kan. 148; *Gee v. Moore*, 12 Cal. 472; *Sweet v. Brown*, 12 Met. 175; 45 Am. Dec. 243; *Locke v. White*, 89 Ind. 492; *Habig v. Dodge*, 127 Ind. 31; 25 N. E. Rep. 182; *Bryan v. Utland*, 101 Ind. 477; *Reynolds v. Shaver*, 59 Ark. 299; 43 Am. St. Rep. 36; *Hanrick v. Patrick*, 119 U. S. 156; *Bates v. Foster*, 59 Me. 157; 8 Am. Rep. 406; *Kimball v. Semple*, 25 Cal. 440; *McNear v. McComber*, 18 Iowa, 12; *McDonough v. Martin*, 88 Ga. 675; *Bowen v. Thrall*, 28 Vt. 382; *Cummings v. Dearborn*, 56 Vt. 441; *Marsh v. Fish*, 66 Vt. 213; *Stockwell v. Couillard*, 129 Mass. 231; *Allen v. Holton*, 20 Pick. 458.



*eo instanti*, and an action can be immediately commenced.<sup>1</sup> If a person executes a deed with a covenant of warranty, and the deed under which he holds contains a condition against the erection of buildings on a portion of the land, there is a breach of the covenant.<sup>2</sup> A grantee who has become the purchaser of an existing mortgage is not compelled to foreclose the mortgage for his protection, but may recover on his covenants of warranty.<sup>3</sup>

§ 933. **Right of joint possession.**—A person suing upon a covenant of warranty must of course have an interest which has been injured or disturbed. But where a deed contains a proviso that the right of possession shall be reserved to the mother and sister of the grantee as well as to himself, for use as a homestead until he arrives at majority, he has such an interest as entitles him to sue upon the covenant for a breach.<sup>4</sup>

<sup>1</sup> *Rex v. Creel*, 22 W. Va. 373. But otherwise where the holder of the paramount title is not in possession of the land nor positively asserting title against the grantee: *Jones v. Paul*, 59 Tex. 41.

<sup>2</sup> *Kramer v. Carter*, 136 Mass. 504. Where the premises conveyed were not described as a millsite, but a waterpower and flouring-mill were situated on them, the exercise subsequently by an adjoining owner of a right possessed by him to raise the dam, thus throwing the water back, injuring the buildings and overflowing the land, constitutes a breach: *Scriver v. Smith*, 30 Hun, 129.

<sup>3</sup> *Royer v. Foster*, 62 Iowa, 321.

<sup>4</sup> *Mason v. Kellogg*, 38 Mich. 132. Said Graves, J., in delivering the opinion of the court: "The grantors do not appear to have retained anything. The grant was to the plaintiff, in fee, with a qualified use to him and his mother and sister for a term limited to a few months, and which might be cut short by the occurrence of his mother's death sooner. Let it be admitted that plaintiff and his mother and sister were vested with a right to the land itself under this clause: *Shep. Touch.* 93; *Co. Litt.* 4 b; *Green v. Biddle*, 8 Wheat. 1, 76. Let it be conceded that in virtue of being entitled to the described special kind of use and enjoyment for the time limited, they were by force of the deed and the statute (*Comp. Laws*, §§ 4116, 4118) vested for such time with a legal estate of the same quality and duration, and subject to the same conditions as the beneficial interest as meant by the grantor; and still the plaintiff had all the estate and right not embraced by the clause in question, and likewise the right under that clause to present possession and enjoyment in common with his mother and sister. His interest was severable from theirs. It was much more extensive. It covered everything except the trifling

**§ 934. Damages for breach of covenants of quiet enjoyment and of warranty.**—In some of the States the measure of damages for a breach of these covenants is the value of the land at the time of injury by defect of title and eviction.<sup>1</sup> But the general rule now is that the damages for a breach of these covenants are measured by the consideration, or what the land was worth as determined by the parties or by the consideration price, together with interest for the time the purchaser has lost the mesne profits, and also the costs and expenses incurred by the covenantee in defending the suit to evict him.<sup>2</sup> For

matter of their right to use and enjoy with him in the special mode limited up to August 9, 1876. That he had an interest and present right capable of being so disturbed and infringed as to give him an immediate right of action upon the covenant cannot be doubted, and the nature of his right and interest entitled him to sue alone: *Rawle on Cov.* 599; *Barbour on Parties*, 33."

*Park v. Bates*, 12 Vt. 381; 36 Am. Dec. 347; *Keeler v. Wood*, 30 Vt. 242; *Keith v. Day*, 15 Vt. 660; *Drury v. Shumway*, Chip. D. 111; 1 Am. Dec. 704; *Sterling v. Peet*, 14 Conn. 245; *Horsford v. Wright*, Kirby, 3; 1 Am. Dec. 8; *Sweet v. Patrick*, 12 Me. 9; *Doherty v. Dolan*, 65 Me. 87; 20 Am. Rep. 677; *Cushman v. Blanchard*, 2 Greenl. 268; 11 Am. Dec. 76; *Hardy v. Nelson*, 27 Me. 525; *Elder v. True*, 30 Me. 104; *Caswell v. Wendell*, 4 Mass. 108; *Norton v. Babcock*, 2 Met. 516; *White v. Whitney*, 3 Met. 81; *Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182; *Bigelow v. Jones*, 4 Mass. 512. And see, also, where once recognized, *Nelson v. Matthews*, 2 Hen. & M. 164; 3 Am. Dec. 620; *Witherspoon v. McCalla*, 3 Desaus. Eq. 245; *Liber v. Parsons*, 1 Bay, 19; *Mills v. Bell*, 3 Call, 277; *Guerard v. Rivers*, 1 Bay, 265; *Erebright v. Still*, 1 Bay, 92.

<sup>1</sup> *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456; *Tong v. Matthews*, 23 Mo. 437; *McClure v. Gamble*, 27 Pa. St. 288; *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309; *Brown v. Dickerson*, 12 Pa. St. 372; *Oathcart v. Bowman*, 5 Pa. St. 317; *Cox v. Henry*, 32 Pa. St. 18; *Williamson v. Test*, 24 Iowa, 138; *Hallam v. Todhunter*, 24 Iowa, 166; *Elliott v. Thompson*, 4 Humph. 99; 40 Am. Dec. 630; *Dalton v. Bowker*, 8 Nev. 190; *Phillips v. Reichert*, 17 Ind. 120; 79 Am. Dec. 463; *Clark v. Burr*, 14 Ohio, 188; *Harding v. Larkin*, 41 Ill. 413; *Whitlock v. Crew*, 28 Ga. 289; *Marshall v. McConnell*, 1 Litt. 419; *Cummins v. Kennedy*, 3 Litt. 118; 14 Am. Dec. 45; *Lloyd v. Quinby*, 5 Ohio St. 262; *Wade v. Comstock*, 11 Ohio St. 71; *Swafford v. Whipple*, 3 Greene, G. 261; 54 Am. Dec. 498; *Gridley v. Tucker*, Freem. Ch. 209; *Pence v. Duvall*, 9 Mon. B. 48; *Robertson v. Lemon*, 2 Bush, 301; *Davis v. Smith*, 5 Ga. 274; 47 Am. Dec. 279; *Wood v. Kingston Coal Co.*, 48 Ill. 356; 95 Am. Dec. 554; *Bond v. Quattlebaum*, 1 McCord, 584; 10 Am. Dec. 702; *Cox's Heirs v. Strode*, 2 Bibb, 277; 5 Am. Dec. 603; *Booker v. Bill*, 3 Bibb, 173; 6 Am. Dec. 641; *Davis v. Hall*, 2 Bibb, 590; *Robards v. Netherland*, 3 Bibb, 529;

a partial breach damages are recoverable, according to the same rule, in proportion to the extent of the breach.<sup>1</sup> If the eviction is by a paramount lien, damages may be recovered to the extent of the lien, if this does not exceed the amount that could be recovered for an eviction for failure of title.<sup>2</sup> If the adverse title has been extinguished, the covenantee may recover what he has paid therefor, with a fair remuneration for his trouble, and he will also be allowed the reasonable incidental expenses. But the total

*Holmes v. Senneckson*, 15 N. J. L. 813; *Pearson v. Davis*, 1 McMull. 37; *Grist v. Hodges*, 3 Dev. 198; *Bennett v. Jenkins*, 13 Johns. 50; *Burton v. Reeds*, 20 Ind. 87; *Cincinnati etc. R. R. Co. v. Pearce*, 28 Ind. 502; *Threkheld v. Fitzhugh*, 2 Leigh, 451; *Jackson v. Turner*, 5 Leigh, 127; *Foster v. Thompson*, 41 N. H. 373; *Wallace v. Talbot*, 1 McCord, 466; *Talbot v. Bedford, Cooke*, 447; *Lowther v. Commonwealth*, 1 Hen. & M. 202; *Eare v. Middleton*, 1 Cheves, 127; *Orenshaw v. Smith*, 5 Munf. 415; *McMillan v. Ritchie*, 3 Mon. 348; 16 Am. Dec. 107; *Kennedy v. Davis*, 7 Mon. 76; *Hanson v. Buckner*, 4 Dana, 251; 29 Am. Dec. 401; *Morris v. Rowan*, 17 N. J. L. 304; *Taylor v. Holton*, 1 Mont. 688; *Stebbins v. Wolf*, 33 Kan. 765; *Rogers v. Golson* (Tex. Civ. App.), 31 S. W. Rep. 200; *Sheffey v. Gardiner*, 79 Va. 313; *Barnett v. Hughey*, 54 Ark. 195; 15 S. W. Rep. 464; *Taylor v. Wallace*, 20 Colo. 211; 37 Pac. Rep. 693; *Rhea v. Swain*, 122 Ind. 272; *Bellows v. Litchfield*, 83 Iowa, 36; 48 N. W. Rep. 1062; *Boyers v. Amet*, 41 La. Ann. 721; 6 So. Rep. 734; *Cook v. Curtis*, 68 Mich. 611; *Devine v. Lewis*, 38 Minn. 24; 35 N. W. Rep. 711; *Matheny v. Stewart*, 108 Mo. 73; 17 S. W. Rep. 1014; *Hoffman v. Bosch*, 18 Nev. 360; 4 Pac. Rep. 703; *Taylor v. Holter*, 1 Mont. 688; *Winnipeg Paper Co. v. Eaton*, 65 N. H. 13; 18 Atl. Rep. 171; *Ramsey v. Wallace*, 100 N. O. 75; 6 S. E. Rep. 638; *Rash v. Jenne*, 26 Or. 169; 37 Pac. Rep. 538; *Thiele v. Axell*, 5 Tex. Civ. App. 548.

<sup>1</sup> *Mayor v. Donnovant*, 25 Ill. 262; *Griffin v. Reynolds*, 17 How. 609; *Dougherty v. Duvall's Heirs*, 9 Mon. B. 57; *Raines v. Calloway*, 27 Tex. 678; *Boyle v. Edwards*, 114 Mass. 373; *Dickins v. Sheppard*, 3 Murph. 526; *Morris v. Harris*, 9 Gill. 19; *Hunt v. Orwig*, 17 Mon. B. 73; 66 Am. Dec. 144; *Dimmick v. Lockwood*, 10 Wend. 142; *Williams v. Beeman*, 2 Dev. 483; *Hoot v. Spade*, 20 Ired. 326.

<sup>2</sup> *Tufts v. Adams*, 8 Pick. 547; *Donohoe v. Emery*, 9 Met. 63; *White v. Whitney*, 3 Met. 81; *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341; *Holbrook v. Weatherbee*, 12 Me. 502; *Winslow v. McCall*, 32 Barb. 241. And see, also, *Norton v. Babcock*, 2 Met. 510; *Stewart v. Drake*, 9 N. J. L. 139; *Elder v. True*, 32 Me. 104; *Chapel v. Bull*, 17 Mass. 213; *Copeland v. Copeland*, 30 Me. 446; *Harper v. Jeffries*, 5 Whart. 26; *Lloyd v. Quinby*, 5 Ohio St. 262; *Burk v. Clements*, 16 Ind. 132; *Pittman v. Connor*, 27 Ind. 337; *Miller v. Halsey*, 14 N. J. L. 48; *McGinnis v. Noble*, 7 Watts & S. 454; *Mellon's Appeal*, 32 Pa. St. 121; *Blood v. Wilkins*, 43 Iowa, 565; *Smith v. Dixon*, 27 Ohio St. 471.

amount cannot exceed what he could recover on a total loss of title.<sup>1</sup> The covenantee can have but one satisfaction, although he may sue the first or any succeeding covenantor.<sup>2</sup> An intermediate grantee who has conveyed the land may, in case of damage, maintain an action against a remote grantor.<sup>3</sup>

§ 935. **Notice to the covenantor of suit.**—If an action is brought by a person claiming a paramount title to recover the premises from the covenantee, the latter, by giving notice to the covenantor of such suit, and request-

<sup>1</sup> Swett v. Patrick, 12 Me. 9; Bailey v. Scott, 13 Wis. 619; Lane v. Fury, 31 Ohio St. 574; McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456; Leffingwell v. Elliott, 10 Pick. 204; 8 Pick. 457; 19 Am. Dec. 343; Loomis v. Bedel, 11 N. H. 74; Dale v. Shively, 8 Kan. 276; Jones v. Lightfoot, 10 Ala. 17; Thayer v. Clemence, 22 Pick. 490; Estabrook v. Smith, 6 Gray, 572; 66 Am. Dec. 445; Yokum v. Thomas, 15 Iowa, 67; Richards v. Iowa Homestead Co., 44 Iowa, 304; 24 Am. Rep. 745; Claycomb v. Munger, 51 Ill. 373; Fawcett v. Woods, 5 Iowa, 400; Spring v. Chase, 22 Me. 505; 39 Am. Dec. 595; Kelly v. Low, 18 Me. 244; Allis v. Nininger, 25 Minn. 525; Hurd v. Hall, 12 Wis. 112; Lewis v. Harris, 31 Ala. 689; Lane v. Desire, 23 Mo. 151; McKee v. Bain, 11 Kan. 569. And see Martin v. Atkinson, 7 Ga. 228; 50 Am. Dec. 403; Ferris v. Mosher, 27 Vt. 218; 65 Am. Dec. 192; Baxter v. Ryerss, 13 Barb. 267.

<sup>2</sup> Crooker v. Jewell, 29 Me. 527; Birney v. Hann, 3 Marsh. A. K. 322; 13 Am. Dec. 167; Lowe v. McDonald, 3 Marsh. A. K. 354; 13 Am. Dec. 181; Wilson v. Taylor, 9 Ohio St. 595; 75 Am. Dec. 488; King v. Kerr, 5 Ohio, 154; 22 Am. Dec. 777; Crisfield v. Storr, 36 Me. 129; Withy v. Mumford, 5 Cowen, 137; Lot v. Parish, 1 Litt. 393; Williams v. Beeman, 2 Dev. 483; Hunt v. Orwig, 17 Mon. B. 73; 66 Am. Dec. 144; Claycomb v. Munger, 51 Ill. 373; Suydam v. Jones, 10 Wend. 180; 25 Am. Dec. 552; Thompson v. Sanders, 5 Mon. 58; Williams v. Beeman, 2 Dev. 483.

<sup>3</sup> Birney v. Hann, 3 Marsh. A. K. 322; 13 Am. Dec. 167. "As the indorser of a commercial instrument," said Mills, J., "who has paid its contents can sustain his action against his remote indorser without a reindorsement, because his indorsement, by the act of payment, *per se*, has become *functus officio* as to him, so ought Hann, who has rendered his own deed inoperative further against him, to be restored to the situation he was in before it was made, without a conveyance formally executed." And see, also, Wheeler v. Sohler, 3 Cush. 219; Claycomb v. Munger, 51 Ill. 373; Herrin v. McEntyre, 1 Hawks, 410; Thompson v. Sanders, 5 Mon. 357; Lot v. Parish, 1 Litt. 393; Baxter v. Ryerss, 13 Barb. 267; Booth v. Starr, 1 Conn. 244; 6 Am. Dec. 233; Redwine v. Brown, 10 Ga. 311; Withy v. Mumford, 5 Cow. 137; Markland v. Crump, 1 Dev. & B. 94; 27 Am. Dec. 230; Thompson v. Shattuck, 2 Met. 618.

ing him to undertake its defense, may liberate himself from the necessity of proving, in case the claimant of the paramount title is successful, the validity of such title, when suing upon his covenant.<sup>1</sup> If the grantor himself defended the suit, it is no defense that the defendant in the ejectment suit was not in possession.<sup>2</sup> When proper notice has been given, and suit is brought by the covenantee against his covenantor, the latter, in the absence of fraud or collusion, will not be permitted to make the issue that the recovery against the former was not obtained by virtue of a paramount title.<sup>3</sup> But this rule, it seems, does not prevail in North Carolina.<sup>4</sup> If the covenantee is compelled to bring suit, in the first instance, to acquire possession of the premises, it is generally held, that if he gives notice to the covenantor to prosecute the suit, the judgment will be conclusive upon him.<sup>5</sup> But in Tennessee, a different conclusion was reached by the court, on

<sup>1</sup> *Greenlaw v. Williams*, 2 Lea (Tenn.), 533; *Park v. Bates*, 12 Vt. 381; 36 Am. Dec. 347; *Swenk v. Stout*, 2 Yeates, 470; *Hinds v. Allen*, 34 Conn. 195; *Bender v. Fromberger*, 4 Dall. 436; *Wimberly v. Collier*, 32 Ga. 13; *Leather v. Poulteny*, 4 Binn. 356; *Williams v. Wetherbee*, 2 Aikens, 307; *Collingwood v. Irwin*, 3 Watts, 310; *Mooney v. Burchard*, 84 Ind. 285; *Ives v. Niles*, 5 Ind. 323; *King v. Kerr*, 5 Ohio, 158; 22 Am. Dec. 777; *City of St. Louis v. Bissell*, 46 Mo. 157; *Morgan v. Muldoon*, 82 Ind. 347; *Paul v. Witman*, 3 Watts & S. 409; *Wendel v. North*, 24 Wis. 223; *Somers v. Schmidt*, 24 Wis. 419; 1 Am. Rep. 191; *Jones v. Whitsett*, 79 Mo. 188; *Middleton v. Thompson*, 1 Spear, 67; *Pitkin v. Leavitt*, 13 Vt. 379; *Brown v. Taylor*, 13 Vt. 631; 37 Am. Dec. 618; *Turner v. Goodrich*, 26 Vt. 708; *Cooper v. Watson*, 10 Wend. 205; *Chapman v. Holmes*, 5 Halst. 20; *Booker v. Bell*, 3 Bibb, 173; 6 Am. Dec. 641; *Prewitt v. Kenton*, 3 Bibb, 282; *Cox v. Strode*, 4 Bibb, 4; *Miner v. Clark*, 15 Wend. 427; *Morris v. Rowan*, 2 Har. (N. J.) 307; *Kelly v. The Dutch Church*, 2 Hill, 105; *Wilson v. McElwee*, 1 Strob. 65; *Jones v. Waggoner*, 7 Marsh. J. J. 144; *Davis v. Wilbourne*, 1 Hill (S. C.), 28; 26 Am. Dec. 154; *Boyd v. Whitfield*, 19 Ark. 469; *Graham v. Tankersley*, 15 Ala. 634. See *Cummings v. Harrison*, 57 Miss. 275; *Walton v. Cox*, 67 Ind. 164.

<sup>2</sup> *Jones v. Whitsett*, 79 Mo. 188.

<sup>3</sup> *McConnel v. Downs*, 48 Ill. 271; *Sisk v. Woodruff*, 15 Ill. 15.

<sup>4</sup> *Martin v. Cowles*, 2 Dev. & B. 101; *Wilder v. Ireland*, 8 Jones (N. C.), 88; *Shober v. Robinson*, 2 Murph. 33; *Saunders v. Hamilton*, 2 Hayw. (N. C.) 282.

<sup>5</sup> *Pitkin v. Leavitt*, 13 Vt. 379; *Brown v. Taylor*, 13 Vt. 631; 37 Am. Dec. 618; *White v. Williams*, 13 Tex. 258; *Gragg v. Richardson*, 25 Ga. 570; 71 Am. Dec. 190; *Park v. Bates*, 12 Vt. 381; 36 Am. Dec. 347.

the ground that the law only authorized the making the covenantor a defendant, and not a plaintiff.<sup>1</sup> The notice may be by parol.<sup>2</sup> But mere knowledge derived from third persons, as distinguished from notice, is not sufficient.<sup>3</sup> The notice should be certain, explicit, and unequivocal.<sup>4</sup>

§ 936. **Comments.**—Although it seems that a parol notice is sufficient, yet as a matter of practice, it is obvious that it is better always to give it in writing. The notice must be direct and certain, and after the lapse of a considerable period of time it would, considering the infirmity of human memory, be almost impossible to remember the exact language in which the notice was given. The notice given to the covenantor should be considered as a notice in a legal proceeding, and ought on general principles to be couched in writing. Mr. Justice Bronson has aptly said, in a dissenting opinion, after referring to the practice under the old system of voucher by a writ of summons, where the right could only be exercised by means of a writ served by an officer, “he ought not, in the other, to be prejudiced by anything less definite and formal than a writing which will advise him of what has been done, and what he is required to do.”<sup>5</sup> And probably now under statutory provisions requiring notices in legal proceedings to be in writing, a written notice would be necessary.

§ 937. **Where no notice is given to the covenantor.**—There has been some discussion, resulting in a variance of opinion, as to what effect a judgment possesses,

<sup>1</sup> *Ferrell v. Alder*, 8 Humph. 44.

<sup>2</sup> *Miner v. Clark*, 15 Wend. 427. But see *Mason v. Kellogg*, 38 Mich. 132.

<sup>3</sup> *Somers v. Schmidt*, 24 Wis. 417; 1 Am. Rep. 191; *Collins v. Baker*, 6 Mo. App. 588.

<sup>4</sup> *Paul v. Witman*, 3 Watts & S. 410; *Boyd v. Whitfield*, 19 Ark. 470; *Collins v. Baker*, 6 Mo. App. 588. It is for the jury to decide whether the notice was received or not: *Collingwood v. Irwin*, 3 Watts, 310. But whether it was a proper notice as to time is a question for the court: *Davis v. Wilbourne*, 1 Hill (S. C.), 28; 26 Am. Dec. 154.

<sup>5</sup> *Miner v. Clark*, 15 Wend. 427.

when the covenantor had not been notified of the suit, and was not requested to defend. Of course, such a judgment cannot bind the covenantor. The only question that can arise is one of evidence. It has been asserted that, although the defendant might inquire into the merits of the judgment, yet it was *prima facie* evidence of the existence of a paramount title.<sup>1</sup> But the more reasonable rule, and the one sustained by authority, is that the judgment, where no notice has been given, and the covenantor is not a party to the suit, is not even *prima facie* evidence that the eviction was founded upon an adverse and paramount title.<sup>2</sup> "It is a familiar principle of law that a man shall not be bound by a judgment pronounced in a proceeding to which he is not a party, actually or constructively. He should be allowed to appear in the case, and adduce evidence in support of his rights before he is concluded by the judgment. If a warrantor has no notice of the action against his grantee, and no opportunity of showing therein that he transferred a good title, he cannot, in any sense, be considered a party to the action, and therefore ought not to be bound by any adjudication of the question of title. But, if he has notice, he may become a party to the suit, and it is his own fault if his title is not fully presented and investigated. He then has an opportunity of sustaining the title he has warranted, and defeating a recovery by the plaintiff in ejectment. If he fails to do this successfully, he is concluded from afterward asserting the superiority of that title, and compelled to refund the purchase money, with interest. By giving the warrantor notice; the defendant in ejectment may relieve himself from the burden of afterward proving the validity of the title under which he is evicted. But, if he neglects to give the notice, he must come prepared to prove, on

<sup>1</sup> Collingwood v. Irwin, 3 Watts, 310; Pitkins v. Leavitt, 13 Vt. 384; Paul v. Whitman, 3 Watts & S. 407.

<sup>2</sup> Hanson v. Buckner, 4 Dana, 254; 29 Am. Dec. 401; Booker v. Bell, 3 Bibb, 175; 6 Am. Dec. 641; Graham v. Tankersley, 15 Ala. 645; Stevens v. Jack, 3 Yerg. 403; Devour v. Johnson, 3 Bibb, 410; Prewitt v. Kenton, 3 Bibb, 282; Cox v. Strode, 4 Bibb, 4; Rhode v. Green, 26 Ind. 83.



the trial of the action of covenant, that he was evicted by force of an adverse and superior title; in other words, he must show that the warrantor, by appearing and defending the action of ejectment, could not have prevented a recovery."<sup>1</sup> It does not follow as a necessary conclusion that the defendant has been defeated in a suit in ejectment because his title was defective. He may have suffered judgment to go against him, or the plaintiff may have recovered on some technical ground. It, perhaps, is unnecessary to remark that want of notice to the covenantor of the pendency of the prior suit, while giving him an opportunity to show his title when sued upon the covenant, cannot defeat a recovery on the part of the covenantee. The latter is under no obligation to give notice to enable him to recover.<sup>2</sup>

**§ 938. Mortgagee entitled to benefit of covenant.**—Where land has been purchased by a mortgagor with covenants of warranty, the mortgagee is entitled to the benefit of such covenants. Thus, a person purchased land with covenants of warranty, and subsequently executed a mortgage upon it, and finally the title passed to another. It was then found that the title originally acquired by the mortgagor had totally failed, whereupon the grantor of the mortgagor paid to the last grantee, in ignorance of the existence of the mortgage, the amount of his liability

<sup>1</sup> *Sisk v. Woodruff*, 15 Ill. 15, per Treat, C. J. See, also, *Fields v. Hunter*, 8 Mo. 128. In some cases a judgment has been deemed evidence of the bare fact of an eviction: *Hanson v. Buckner*, 4 Dana, 254; 29 Am. Dec. 401; *Booker v. Bell*, 3 Bibb, 175; 6 Am. Dec. 641; *Rhode v. Green*, 26 Ind. 83. But in other cases it is held that unless there is evidence of some change of possession, actual or constructive, a judgment is not evidence of an eviction: *Hoy v. Taliaferro*, 8 Smedes & M. 741; *Miller v. Avery*, 2 Barb. Ch. 582; *McDowell v. Hunter*, Dud. (Ga.) 4; *Webb v. Alexander*, 7 Wend. 288; *Paul v. Witman*, 3 Watts & S. 407; *Dennis v. Heath*, 11 Smedes & M. 218; 49 Am. Dec. 51.

<sup>2</sup> *King v. Kerr*, 5 Ohio, 158; 22 Am. Dec. 777; *Claycomb v. Munger*, 51 Ill. 378; *Rhode v. Green*, 26 Ind. 83; *Smith v. Compton*, 3 Barn. & Adol. 408; *Duffield v. Scott*, 3 Term Rep. 376. Where a grantee has surrendered possession to one claiming adversely, he must show that the title of such person is paramount to that of his grantor: *Snyder v. Jennings*, 15 Neb. 372.

on the covenant. An action was brought to foreclose the mortgage, and the court decided that equity had jurisdiction to compel the last grantee to whom the money was paid to repay so much of the amount received by him as was necessary for the protection of the mortgagor.<sup>1</sup> The court considered that the mistake of the parties as to the fact of the nonexistence of the mortgage was a sufficient reason upon which to found a right of recovery. To the argument that this liability was purely legal, and that a complete remedy might be had at law, Mr. Chief Justice Beck replied: "But mistakes whereby parties are deprived of their property or money have always been subjects of chancery cognizance, and remedies to relieve therefrom are never refused in that forum. While it is true that money paid by mistake may be recovered at law, and when no circumstances attend the case which will bring it within chancery jurisdiction, the remedy must be sought at law, yet if for any reason the case is of equitable cognizance, the party will not be required to go to another forum to recover the money, but will have full relief in equity."<sup>2</sup>

§ 939. **Interest and counsel fees as damages.**—The plaintiff is generally allowed to recover interest upon the purchase money as part of the damages to which he is entitled, as an offset to the right of the owner of the paramount title to mesne profits.<sup>3</sup> But the recovery of interest is confined within the limits for which a recovery of the mesne profits may be had. "The buyer in the covenant of seisin recovers back the consideration money and interest, and no more. The interest is to countervail the claim for mesne profits, and is, and ought to be, commen-

<sup>1</sup> *Rose v. Schaffner*, 50 Iowa, 483.

<sup>2</sup> *Rose v. Schaffner*, *supra*. But see *Davidson v. Cox*, 10 Neb. 150.

<sup>3</sup> *Sumner v. Williams*, 8 Mass. 222; 5 Am. Dec. 83; *Downer v. Smith*, 38 Vt. 464; *Staats v. Ten Eyck*, 3 Caines, 111; 2 Am. Dec. 254; *Brandt v. Foster*, 5 Iowa, 295; *Winslow v. McCall*, 32 Barb. 241; *McNear v. McComber*, 18 Iowa, 12; *Partridge v. Hatch*, 18 N. H. 494. See *Dalton v. Bowker*, 8 Nev. 190; *Leffingwell v. Elliott*, 10 Pick. 204.

surate in point of time with the legal claim to mesne profits."<sup>1</sup> Whether counsel fees can be recovered or not is a mooted question. In some cases they have been considered a proper element of damages.<sup>2</sup> In others, however, they have been held not to be recoverable.<sup>3</sup> But where the covenant is to indemnify the covenantee and save him harmless from all loss and expenses, aside from a covenant for title as such, counsel fees are recoverable as damages.<sup>4</sup> Where notice of the pendency of an action has been given to the covenantor, and he has been requested to defend, and refuses to do so, the legal elements of damage are said to be the costs of the suit, the costs to which the covenantee was subjected in defending it, with interest from the time of payment, and the value of the premises at the date of eviction, with interest from that time.<sup>5</sup>

<sup>1</sup> 4 Kent's Com. 375. See, also, *Patterson v. Stewart*, 6 Watts & S. 528; 40 Am. Dec. 586; *Flint v. Steadman*, 36 Vt. 210; *Oaulkins v. Harris*, 9 Johns. 324; *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46; *Guthrie v. Pugsley*, 12 Johns. 126; *Williams v. Beeman*, 2 Dev. 485; *Partridge v. Hatch*, 18 N. H. 494; *Clark v. Parr*, 14 Ohio, 118; 45 Am. Dec. 529; *Rich v. Johnson*, 1 Ohand. 20; 52 Am. Dec. 144; *Kyle v. Fauntleroy*, 9 Mon. B. 620; *Bennett v. Jenkins*, 13 Johns. 50. But see *Whiting v. Dewey*, 15 Pick. 428.

<sup>2</sup> *Rowe v. Heath*, 23 Tex. 620; *Harding v. Larkin*, 41 Ill. 420; *Rickert v. Snyder*, 9 Wend. 416; *McAlpin v. Woodruff*, 11 Ohio St. 130; *Haynes v. Stevens*, 11 N. H. 28; *Keeler v. Wood*, 30 Vt. 242; *Robertson v. Lemon*, 2 Bush, 303; *Kingsbury v. Smith*, 13 N. H. 125; *Pitken v. Leavitt*, 13 Vt. 379; *Turner v. Goodrich*, 26 Vt. 709; *Drew v. Towle*, 10 Fost. (N. H.) 531; 64 Am. Dec. 309; *Sumner v. Williams*, 8 Mass. 162; 5 Am. Dec. 83.

<sup>3</sup> *Jeter v. Glenn*, 9 Rich. 380; *Williams v. Burg*, 9 Lea (Tenn.), 455; *Gragg v. Richardson*, 25 Ga. 566; 71 Am. Dec. 190. See *Cushman v. Blanchard*, 2 Greenl. 266; 11 Am. Dec. 76; *Kennison v. Taylor*, 18 N. H. 220; *Williamson v. Williamson*, 71 Me. 442; *Harding v. Larkin*, 41 Ill. 413; *Swartz v. Ballou*, 47 Iowa, 188; 29 Am. Rep. 470; *Morris v. Rowan*, 17 N. J. L. 304; *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Robertson v. Lemon*, 2 Bush, 301.

<sup>4</sup> *Robinson v. Bakewill*, 25 Pa. St. (1 Casey), 426; *Cox v. Henry*, 32 Pa. St. (8 Casey), 21; *Anderson v. Washabaugh*, 43 Pa. St. 115.

<sup>5</sup> *Williamson v. Williamson*, 71 Me. 442. See, also, *Gragg v. Richardson*, 25 Ga. 570; 71 Am. Dec. 190; *Haynes v. Stevens*, 11 N. H. 28; *Merritt v. Morse*, 108 Mass. 270; *Pitkin v. Leavitt*, 13 Vt. 379; *White v. Williams*, 13 Tex. 258.

§ 940. **Covenants running with the land.**—Certain covenants are appurtenant to the estate granted by the deed in which such covenants are contained, and bind the assigns of the covenantor, and vest in the assigns of the covenantee in the same manner as if they had personally made them. Covenants of this kind are said to run with the land. A covenant by a grantor that he will not erect, or suffer to be erected, any structure upon a lot adjoining the property which he has conveyed, is a covenant that runs with the land.<sup>1</sup> A covenant to pay assessments will run with the land.<sup>2</sup> So will a covenant made by a grantee that he will not carry on, or allow to be carried on, any offensive trade upon the premises conveyed to him.<sup>3</sup> A covenant in a deed of city lots, providing that any house which should be built upon such lots should be placed back a specified distance from the line of the street on which such lots front, is held to be a covenant running with the land.<sup>4</sup> But an agreement by the grantee contained in a deed-poll to keep in repair a building of the grantor on land adjoining that conveyed, does not run with the land, and hence a subsequent grantee of the adjoining land cannot maintain an action on it.<sup>5</sup> A covenant to maintain fences already built will run with the land.<sup>6</sup> But a covenant to build a fence seems to be personal only.<sup>7</sup> In England, all covenants for title are considered as ap-

<sup>1</sup> *Trustees etc. v. Cowen*, 4 Paige, 510; 27 Am. Dec. 80.

<sup>2</sup> *Kearney v. Post*, 2 N. Y. 394.

<sup>3</sup> *Barron v. Richard*, 8 Paige, 351.

<sup>4</sup> *Winfield v. Henning*, 21 N. J. Eq. 188.

<sup>5</sup> *Martin v. Drinan*, 128 Mass. 515.

<sup>6</sup> *Bronson v. Coffin*, 108 Mass. 175; 11 Am. Rep. 335; *Easter v. Little Miami R. R. Co.*, 14 Ohio St. 48; *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550; *Hazlett v. Sinclair*, 76 Ind. 488; 40 Am. Rep. 254. See, also, *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Gaines v. Poor*, 3 Met. 503; 79 Am. Dec. 559; *Thomas v. Van Kopff*, 6 Gill & J. 372; *Fairbanks v. Williamson*, 7 Me. 98; *Stockett v. Howard*, 34 Md. 121; *Countryman v. Deck*, 13 Abb. N. C. 110; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Worthington v. Hewes*, 19 Ohio St. 68; *Van Rensselaer v. Smith*, 27 Barb. 104; *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40; 46 Am. St. Rep. 545. But see *Kennedy v. Owen*, 136 Mass. 199.

<sup>7</sup> *Hartung v. Witte*, 59 Wis. 285; *Kennedy v. Owen*, 36 Mass. 199.

purtenant to the land, and to run with it.<sup>1</sup> But in this country, the covenants for title considered as running with the land are those for quiet enjoyment, for further assurance, and of warranty.<sup>2</sup> A covenant for the maintenance of a dam and adjacent works for the benefit of an adjoining estate which the covenantor conveys, will run with the land.<sup>3</sup> If at the time the deed is executed a bond is also executed containing a covenant, binding the purchaser, his representatives and assigns, not to permit a warehouse of a certain kind to be built on the land, the covenant runs with the land.<sup>4</sup> A covenant made by a railroad company in consideration of a grant of a right of way, to build and forever maintain a switch from the railroad to the grantor's mill, will run with the land.<sup>5</sup> So it is held, where a deed conveying a right of way to a railroad company, stipulated that the company should build a depot on the right of way, to be used for the purposes of the railroad, but to be the property of the grantor, that the covenant runs with the land. It can be enforced against another company purchasing the property and franchises of the first.<sup>6</sup>

**§ 940 a. Grantee bound by acceptance of deed.—** After acceptance of the deed by the grantee, and entry

<sup>1</sup> *Kingdom v. Nottle*, 1 Maule & S. 355.

<sup>2</sup> *Logan v. Moulder*, 1 Ark. 313; 33 Am. Dec. 338; *White v. Whitney*, 3 Met. 81; *Ohandler v. Brown*, 59 N. H. 370; *Withy v. Munford*, 5 Cowen, 137; *Crisfield v. Storr*, 36 Md. 129; 11 Am. Rep. 480; *Rindskopf v. Farmers' etc. Trust Co.*, 58 Barb. 36; *Burtners v. Keran*, 24 Gratt. 42; *Hunt v. Amidon*, 4 Hill, 345; 40 Am. Dec. 283; *Markland v. Crump*, 1 Dev. & B. 94; 27 Am. Dec. 230; *Olaycomb v. Munger*, 51 Ill. 372; Civil Code Cal. § 1463; *Kimball v. Bryant*, 25 Minn. 496.

<sup>3</sup> *Fitch v. Johnson*, 104 Ill. 111. A covenant by a railroad company to build a fence, in a deed conveying to it a right of way, runs with the land, and a new corporation succeeding by foreclosure to the rights of the old is bound to perform it as a duty blended with its right to use and occupy the land with its track: *Midland Railway Co. v. Fisher*, 125 Ind. 19; 21 Am. St. Rep. 189.

<sup>4</sup> *Robbins v. Webb*, 68 Ala. 393. See, for an instance, a covenant running with the land in relation to the quantity of water flowing in a creek: *Shaber v. St. Paul Water Co.*, 30 Minn. 179.

<sup>5</sup> *Lydick v. Baltimore & Ohio R. R. Co.*, 17 W. Va. 427.

<sup>6</sup> *Georgia Southern R. R. Co. v. Reeves*, 64 Ga. 492.

into possession of the land conveyed, he is bound as effectually by the conditions contained in the deed as though he had signed and executed the deed himself. He is deemed by such acts to have expressly agreed to do what it is stipulated in the deed that he shall do. Whether or not such an obligation is to be deemed, technically speaking, a covenant running with the land, it is, at all events, an agreement on the part of the grantee evidenced by his acceptance of the deed.<sup>1</sup> Thus, the grantee is bound by accepting a deed declaring that it is made subject to the condition that the grantee, his heirs and assigns, shall build and maintain a fence. Such a condition is binding perpetually on the owners of the land conveyed, and in the event of a failure of the grantee and his assigns to comply with it, the grantor may construct or repair the fence, and maintain an action against the original grantee, and those deriving title from him, to charge each with his proper share of the expense.<sup>2</sup>

§ 941. **Markethouse.**—If in a deed to a city of real estate there is a covenant that the lot shall revert, and the grantee shall reconvey when the ground conveyed is no longer used for a market, the fee subject to the easement, is retained by the grantor. The covenant runs with the land, a right of re-entry arising upon an abandonment, and the covenant for a reconveyance dispenses with the necessity of an entry by the reversioner.<sup>3</sup>

§ 942. **Covenants not running with the land.**—In this country, the covenants of seisin against encumbran-

<sup>1</sup> *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40; 46 Am. St. Rep. 545; *Georgia Southern R. R. Co. v. Reeves*, 64 Ga. 492; *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633.

<sup>2</sup> *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40; 46 Am. St. Rep. 545. The grantee is estopped by the acceptance of a deed as fully as the grantor: *Hubbard v. Marshall*, 50 Wis. 327; *Bowman v. Griffith*, 35 Neb. 361; *Chloupek v. Perotka*, 89 Wis. 551; 46 Am. St. Rep. 858; *Lowber v. Connit*, 36 Wis. 176; *Hutchinson v. Chicago etc. Ry. Co.*, 37 Wis. 582; *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159.

<sup>3</sup> *Baker v. St. Louis*, 75 Mo. 671; a. c. 7 Mo. App. 429.

ces, and of good right to convey, are regarded as covenants *in presenti*, and do not run with the land.<sup>1</sup> "The covenants of seisin, and of a right to convey, and that the land is free from encumbrances, are personal covenants, not running with the land or passing to the assignee; for, if not true, there is a breach of them as soon as the deed is executed, and they become *choses in action*, which are not technically assignable."<sup>2</sup> A covenant that the grantee, "his heirs and assigns, owner or owners of the land for the time being," would on a notice of six months resell the land conveyed for a fixed price, does not, it is held, run with the land.<sup>3</sup> So, it is held that a covenant by an owner of land not to erect a gristmill on his premises does not run with the land.<sup>4</sup> A covenant

<sup>1</sup> *Lawrence v. Montgomery*, 37 Cal. 188. See *Greenby v. Wilcocks*, 2 Johns. 1; 3 Am. Dec. 379; *Fuller v. Jillette*, 9 Biss. 296; *Pillsbury v. Mitchell*, 5 Wis. 21; *McCarty v. Leggett*, 3 Hill, 134; *Wilson v. Forbes*, 2 Dev. 30; *Chapman v. Holmes*, 5 Halst. 20; *Hacker v. Storer*, 8 Greenl. 228; *Smith v. Jeffs*, 44 N. H. 482; *Wilson v. Cochran*, 46 Pa. St. 229; *Heath v. Whidden*, 24 Me. 383; *Garfield v. Williams*, 2 Vt. 327; *Coit v. McReynolds*, 2 Rob. (N. Y.) 655; *Carter v. Denman*, 3 Zab. 260; *Ross v. Turner*, 2 Eng. 132; 44 Am. Dec. 531; *Logan v. Moulder*, 1 Ark. 313; 33 Am. Dec. 338; *Grist v. Hodges*, 3 Dev. 200; *Pence v. Duvall*, 9 Mon. B. 48; *South v. Hoy*, 3 Mon. 94; *Brady v. Spurck*, 27 Ill. 482; *Pierce v. Johnson*, 4 Vt. 253; *Richardson v. Dorr*, 5 Vt. 9; *Potter v. Taylor*, 6 Vt. 676; *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 246; *Clark v. Swift*, 3 Met. 390; *Wheelock v. Thayer*, 16 Pick. 68; *Bickford v. Page*, 2 Mass. 455; *Thayer v. Clemence*, 22 Pick. 490; *Blydenburgh v. Cotheal*, 1 Duer, 197; *Williams v. Wetherbee*, 1 Aiken, 233; *Mitchell v. Warner*, 5 Conn. 497; *Davis v. Lyman*, 6 Conn. 249; *Hamilton v. Wilson*, 4 Johns. 72; 4 Am. Dec. 253; *Beddoe v. Wadsworth*, 21 Wend. 120; *Townsend v. Morris*, 6 Cowen, 123; *Garrison v. Sandford*, 7 Halst. 261. But it is held in *Cole v. Kimball*, 52 Vt. 639, that a covenant against encumbrances runs with the land. And see, also, to same effect, *Richard v. Bent*, 59 Ill. 38; 14 Am. Rep. 1; *Foote v. Burnet*, 10 Ohio, 317; 36 Am. Dec. 90; *Eaton v. Lyman*, 30 Wis. 41; *Pillsbury v. Mitchell*, 5 Wis. 17; *Mecklem v. Blake*, 22 Wis. 495; *Devere v. Sunderland*, 17 Ohio, 60; *Jeler v. Glynn*, 9 Rich. 376; *Dickson v. Desire*, 23 Mo. 151; 66 Am. Dec. 661; *Backus v. McCoy*, 3 Ohio, 211; 17 Am. Dec. 585; *Overheiser v. McCallister*, 10 Ind. 41; *McCready v. Brisbane*, 1 Nott & McC. 104.

<sup>2</sup> 4 Kent's Com. 471.

<sup>3</sup> *London etc. Railway Co. v. Gomm*, 30 Week. R. 620; 21 N. Y. Daily Reg. No. 150.

<sup>4</sup> *Harsha v. Reid*, 45 N. Y. 415. See *Brown v. McKee*, 57 N. Y. 684. See, also, *Wheelock v. Thayer*, 16 Pick. 68; *Mayor etc. v. Pattison*, 10



that the tract conveyed includes a specific quantity of land does not run with the land. The grantee of the covenant cannot maintain an action for its breach.<sup>1</sup> An agreement that the products of land shall be transported by a certain common carrier is not a covenant running with the land.<sup>2</sup> An agreement for the payment of taxes outstanding does not run with the land.<sup>3</sup> Nor does a covenant made by a landowner to contribute to the construction of a party wall, when he shall use it, run with the land.<sup>4</sup>

**§ 942 a. Covenant converted into lien.**—An agreement by which a landowner agrees to take water from a

East, 136; *Breever v. Marshall*, 19 N. J. Eq. 537. And see *Hammond v. Port Royal & Augusta Ry. Co.*, 16 S. C. 567.

<sup>1</sup> *Salmon v. Vallejo*, 41 Cal. 481. *Crockett, J.*, in delivering the opinion of the court, said: "A covenant of seisin, or that the grantor has lawful right to convey, or that the land is free from encumbrances, is a personal covenant, and when broken is broken as soon as made. The right of action upon it is a mere chose in action and does not run with the land: *Lawrence v. Montgomery*, 37 Cal. 188. A covenant that the tract conveyed, or that the grant under which it is held includes a specified quantity, stands on the same footing and is broken as soon as made. It either did or did not contain the stipulated quantity, and the fact could not be changed by anything which subsequently transpired. The difficulty of ascertaining the fact does not touch the question of the nature of the covenant. If the deficiency could not be ascertained except by a final official survey under the decree of confirmation that fact might possibly prevent the statute of limitations from running until survey was made, though on this point I express no opinion. But the nature of the covenant remains the same, and is not affected by the fact that there was no proof by which the breach of it could be established until the final survey was made. The breach existed as soon as the covenant was made; but the proof to establish it may not have been attainable until the final survey. The same difficulty might arise under a covenant of seisin, or against encumbrances, which, it is well settled, are personal covenants not running with the land."

<sup>2</sup> *West Virginia Transportation Co. v. Ohio River etc. Co.*, 22 W. Va. 600; 46 Am. Rep. 527. See, also, *Miller v. Noonan*, 12 Mo. App. 370, where it is held that an agreement by a mortgagor to convey to a person to whom the mortgagee may sell, that foreclosure should not be had for a year, and providing for a division of the proceeds of sale, is not a covenant running with the land.

<sup>3</sup> *Graber v. Duncan*, 79 Ind. 565.

<sup>4</sup> *Scott v. McMillan*, 76 N. Y. 141; 8 Daly, 320; *Gibson v. Holden*, 115 Ill. 199; 56 Am. Rep. 146.

water company for the use of the land for a specified term and price, and stating "that the covenant should run with the land," will create a lien on the land for the water supplied for such purposes, binding as against the landowner and his successors in interest with notice. But it is not a covenant running with the land so as to bind personally successors in interest without notice.<sup>1</sup>

§ 943. **Change in character of neighborhood.**—The exercise of the authority of a court of equity to compel the observance of covenants which the owner of land has made with an owner of adjoining land, limiting the use of the lands to the purposes of private residences, in consideration of similar covenants reciprocally made by the latter owner, is within the discretion of the court. Such relief will not be granted if the object of the agreement has been defeated by a change in the character of the neighborhood, so that to deprive the owner of the power of having his property conform to that of the neighborhood would be inequitable.<sup>2</sup> Adjoining owners mutually covenanted for themselves, their heirs and assigns, that none but dwelling-houses should be erected upon their respective premises, and that neither party would allow nor carry on "any stable, schoolhouse, enginehouse, tenement, or community house, or any kind of manufactory, trade, or business." The general current of business had been such that an elevated railroad was built in front of the premises, which injuriously affected the premises, and made them less profitable than they had been for the purpose of a dwelling-house. From the platform of the station persons could look into the windows. This fact, added to the noise of the trains, made it impossible to obtain privacy and quiet, and hence the rental value of the property was lowered. As a contingency had occurred which had not been contemplated by the par-

<sup>1</sup> Fresno Canal etc. Co. v. Rowell, 80 Cal. 114; 13 Am. St. Rep. 112.

<sup>2</sup> Trustees of Columbia College v. Thacher, 87 N. Y. 311; 41 Am. Rep. 365.

ties, and which placed upon the property a condition defeating their objects, rendering the enforcement of the covenant oppressive and inequitable, the court refused to decree its enforcement.<sup>1</sup>

**§ 944. Estoppel from covenants.**—When a deed shows by a recital or covenant that there was an actual intention to grant and receive a certain estate, the parties are estopped from denying the effect of the deed as so intended.<sup>2</sup> Mr. Justice Nelson, after the examination of several cases, says upon this subject: “The principle deducible from these authorities seems to be that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or what is the same thing, if the seisin or possession of a particular estate is

<sup>1</sup> *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365. Said Danforth, J., in delivering the opinion of the court (p. 320): “It is true the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the legislature, and by reason of it there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected in various ways and degrees the uses of property in its neighborhood and property values. It has made the defendant’s property unsuitable for the use to which, by the covenant of the grantor, it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity.”

<sup>2</sup> *Williams v. Presbyterian Society*, 1 Ohio St. 478; *Carver v. Jackson*, 4 Pet. 86; *Fitzhugh v. Tyler*, 9 B. Mon. 561; *Elder v. Derby*, 98 Ill. 228; *Bowman v. Taylor*, 2 Ad. & E. 278; *Wadhams v. Swan*, 109 Ill. 46; *Williams v. Olaiborne*, 1 Smedes & M. Ch. 365; *Doe v. Errington*, 8 Scott, 210; *McBurney v. Cutler*, 18 Barb. 208; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449; *Van Rensselaer v. Kearney*, 11 How. 297; *Gibson v. Chouteau*, 39 Mo. 536; *Taggart v. Risley*, 4 Or. 235; *French v. Spencer*, 21 How. 240; *Root v. Crock*, 7 Pa. St. (Barr.) 380; *Decker v. Caskey*, 2 Green Ch. (3 N. J. Eq.) 446; *Kinsman v. Loomis*, 11 Ohio, 478; *Smith v. Pendell*, 19 Conn. 107; 48 Am. Dec. 146; *Jackson v. Parkhurst*, 9 Wend. 209.

affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterward denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of everyone. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak.”<sup>1</sup> A title subsequently acquired by the vendor to land conveyed at a sale prohibited by law will not pass to the purchaser.<sup>2</sup> An heir apparent who conveys land in which his interest is to arise will be estopped by his deed.<sup>3</sup> If a grantor having no title executes a quitclaim deed, a title subsequently acquired by him will not pass to the grantee.<sup>4</sup>

<sup>1</sup> In *Van Rensselaer v. Kearney*, 11 How. 297, 325. But see *Cameron v. Lewis*, 59 Miss. 134; *Carter v. Bustamente*, 59 Miss. 559; *Bradford v. Russell*, 79 Ind. 64.

<sup>2</sup> *Holmes v. Jones*, 56 Tex. 41.

<sup>3</sup> *Bohon v. Bohon*, 78 Ky. 408. But not his heirs, it seems, if there be no covenant of warranty.

<sup>4</sup> *Benneson v. Aiken*, 102 Ill. 284; 40 Am. Rep. 592.

The rule concerning the passing of an after-acquired title to the grantee applies to corporations as well as to individuals.<sup>1</sup>

§ 945. **The necessity for a covenant.**—In the absence of statutory enactment, the general rule is that the deed must contain a covenant of some kind to cause an after-acquired title to pass by estoppel.<sup>2</sup> In some of the early New York cases, it was held that an after-acquired title passed without any covenant;<sup>3</sup> but these cases were subsequently overruled, and the doctrine announced that a subsequently acquired title would not, in the absence of some covenant or stipulation, pass to the grantee.<sup>4</sup> If land is conveyed with covenants of warranty in payment of a debt, the only remedy of the grantee in case the title proves defective is upon the covenants in the deed.<sup>5</sup>

§ 946. **Statutory regulation.**—In several of the States, it is provided that where title is conveyed by grant, an after-acquired title will pass by operation of law to the grantee and his assigns. Thus, in California, the provision of the Civil Code on this subject is: "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim thereto, the same passes by operation of law to the gran-

<sup>1</sup> *Jones v. Green*, 41 Ark. 363.

<sup>2</sup> *Dart v. Dart*, 7 Conn. 256; *Mitchell v. Woodson*, 37 Miss. 578; *Bennett v. Waller*, 23 Ill. 182; *Jackson v. Hubble*, 1 Cowen, 613; *Varick v. Edwards*, 1 Hoff. Ch. 382; *Fox v. Widgery*, 4 Greenl. 218; *Jackson v. Winslow*, 9 Cowen, 18; *Pelletreau v. Jackson*, 11 Wend. 119; *Jackson v. Bradford*, 4 Wend. 622; *Frink v. Darst*, 14 Ill. 308; 58 Am. Dec. 575; *Doswell v. Buchanan*, 3 Leigh, 365; 23 Am. Dec. 280; *Sparrow v. Kingman*, 1 Comst. 247; *Taft v. Stevens*, 3 Gray, 504; *Howe v. Harrington*, 18 N. J. Eq. (3 Green, C. E.) 495; *Freeman v. Thayer*, 29 Me. 369; *Tillotson v. Kennedy*, 5 Ala. 413; 39 Am. Dec. 330; *Comstock v. Smith*, 13 Pick. 116; 23 Am. Dec. 670; *Kinsman v. Loomis*, 11 Ohio, 475; *Blanchard v. Brooks*, 12 Pick. 47. See *Carliz v. Majors*, 33 Cal. 288; *Quivey v. Baker*, 37 Cal. 465; *Green v. Green*, 103 Cal. 408; *Dalton v. Hamilton*, 50 Cal. 423.

<sup>3</sup> *Jackson v. Bull*, 1 Johns. Cas. 81; *Jackson v. Murray*, 12 Johns. 201.

<sup>4</sup> *Jackson v. Wright*, 14 Johns. 193.

<sup>5</sup> *Van Riswick v. Wallace*, 3 McAr. 388.

tee, or his successors."<sup>1</sup> The court commenting upon an early statute of the same purport said that the effect of its provisions is the same as if it were written upon the face of the deed, that the grantor conveyed all the estate which he then possessed, or which he might at any time afterward acquire.<sup>2</sup> Equity will not allow the grantor to deprive the grantee of the benefit of the after-acquired title, by having the deed made to a third person who has no real interest in the transaction.<sup>3</sup> Where covenants for title are contained in the deed, the after-acquired title will pass with the same effect as if it had originally been conveyed to the grantee and his successors.<sup>4</sup>

<sup>1</sup> Civil Code Cal. § 1106. And see *Valle v. Clemens*, 18 Mo. 490; *Gibson v. Chouteau*, 39 Mo. 567; *Bogy v. Shoab*, 13 Mo. 379; *Geyer v. Girard*, 22 Mo. 159; *Amonett v. Amis*, 16 La. Ann. 226; *Frink v. Darst*, 14 Ill. 308; 58 Am. Dec. 575; *Morrison v. Wilson*, 30 Cal. 344; *Green v. Clark*, 31 Cal. 591; *San Francisco v. Lawton*, 18 Cal. 477; 79 Am. Dec. 187.

<sup>2</sup> *Clark v. Baker*, 14 Cal. 612, 630; 76 Am. Dec. 449.

<sup>3</sup> *Quivey v. Baker*, 37 Cal. 465.

<sup>4</sup> *Kimball v. Schoff*, 40 N. H. 190; *Irvine v. Irvine*, 9 Wall. 617; *Funk v. Newcomer*, 10 Md. 316; *Logan v. Moore*, 7 Dana, 76; *Patterson v. Pease*, 5 Ohio, 90; *Robertson v. Gaines*, 21 Tenn. (2 Humph.) 383; *Terrett v. Taylor*, 9 Cranch, 52; *Tillotson v. Kennedy*, 5 Ala. 413; 39 Am. Dec. 330; *Middlebury College v. Cheney*, 1 Vt. 349; *Lawry v. Williams*, 13 Me. 281; *Baxter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49; *Rathbun v. Rathbun*, 6 Barb. 107; *Scott v. Douglas*, 7 Ohio, 227; *Barton v. Morris*, 15 Ohio, 408; *Jackson v. Winslow*, 9 Cowen, 18; *Hoyt v. Dimon*, 5 Day, 479; *Kellogg v. Wood*, 4 Paige, 578; *Williams v. Thurlow*, 31 Me. 395; *Kimball v. Blaisdell*, 5 N. H. 533; 22 Am. Dec. 476; *Sparrow v. Kingman*, 1 Comst. 246; *Sherwood v. Barlow*, 19 Conn. 476; *Pike v. Galvin*, 29 Me. 183; *Kennedy v. McCartney*, 4 Port. 141; *Bean v. Welsh*, 17 Ala. 772; *Pierce v. Milwaukee R. R. Co.*, 24 Wis. 553; 1 Am. Rep. 203; *Dickerson v. Talbot*, 14 Mon. B. 64; *Dewolf v. Haydn*, 24 Ill. 525; *King v. Gilson*, 32 Ill. 348; 83 Am. Dec. 269; *Reeder v. Craig*, 3 McCord, 411; *O'Bannon v. Paremour*, 24 Ga. 493; *Somes v. Skinner*, 3 Pick. 52; *Trull v. Eastman*, 3 Met. 121; 37 Am. Dec. 126; *Wade v. Lindsey*, 6 Met. 413; *Mason v. Muncaster*, 9 Wheat. 445; *Thorndike v. Norris*, 24 N. H. (4 Fost.) 454; *Jewell v. Porter*, 31 N. H. (11 Fost.) 39; *Hayes v. Tabor*, 41 N. H. 521; *Blake v. Tucker*, 12 Vt. 44; *Blanchard v. Brooks*, 12 Pick. 47; *Comstock v. Smith*, 13 Pick. 116; 23 Am. Dec. 670; *Gibbs v. Thayer*, 6 Cush. 30; *Ruggles v. Barton*, 13 Gray, 506; *Thomas v. Stickle*, 32 Iowa, 72; *Massie v. Sebastian*, 4 Bibb, 436; *Logan v. Steel*, 4 Mont. 433; *Rigg v. Cook*, 4 Gilm. 348; 46 Am. Dec. 462; *Jones v. King*, 25 Ill. 384; *Bennett v. Waller*, 23 Ill. 183; *Gochenour v. Mowry*, 33 Ill. 333; *Mitchell v. Woodson*, 37 Miss. 578; *Wightman v. Reynolds*, 24 Miss. 675; *Davis v. Keller*, 5 Rich. Eq. 434; *Brundred v. Walker*, 1 Beasl. 140.

§ 947. **Limitations on this rule.**—If the deed is imperfectly executed, and for this reason is not sufficient to pass the title, there being no right of action, there is no estoppel.<sup>1</sup> Where the grantor uses the words “right, title, and interest,” showing that he intended to transfer no greater title than that which he possessed, an after-acquired title will not pass by estoppel.<sup>2</sup> When the covenants have been extinguished, no estoppel arises.<sup>3</sup> The grantor may acquire a title by the disseisin of his grantee, or those claiming under him, and adverse possession for the requisite time, and he is not estopped from asserting the title thus acquired against his grantee.<sup>4</sup> “We consider that a grantee can, under circumstances, be disseised by his own grantor, as well as by another.”<sup>5</sup> An estoppel does not arise from a covenant of seisin in those States where an actual though a tortious possession is sufficient to satisfy this covenant.<sup>6</sup> Where the grantor covenants against his own acts only, an estoppel will not be created by the acquisition of another title.<sup>7</sup>

§ 948. **Estoppel of State.**—Where a grant is made by a State, the general rule is, that the doctrine of estoppel applies to the same extent as if the conveyance had been

<sup>1</sup> *Connor v. McMurray*, 2 Allen, 104; *Patterson v. Pease*, 5 Ohio, 191; *Kercheval v. Triplett*, 1 Marsh. A. K. 493; *Wallace v. Miner*, 6 Ohio, 370. See *Dominick v. Michael*, 4 Sand. 417.

<sup>2</sup> *Blanchard v. Brooks*, 12 Pick. 47; *Adams v. Ross*, 1 Vroom, 509; 82 Am. Dec. 237; *White v. Brocaw*, 14 Ohio St. 343. And see *Allen v. Holton*, 20 Pick. 463; *Sweet v. Brown*, 12 Met. 175; 45 Am. Dec. 243; *Bates v. Foster*, 59 Me. 158; 8 Am. Rep. 406; *Ballard v. Child*, 46 Me. 153; *McNear v. McComber*, 18 Iowa, 14; *Wynn v. Harman*, 5 Gratt. 157; *Mills v. Catlin*, 22 Vt. 98; *Whiting v. Dewey*, 15 Pick. 434; *Hubbard v. Apthorp*, 3 Cush. 419.

<sup>3</sup> *Goodel v. Bennett*, 22 Wis. 565.

<sup>4</sup> *Hines v. Robinson*, 57 Me. 330; 99 Am. Dec. 772; *Stearns v. Hendersass*, 9 Cush. 497; 57 Am. Dec. 65; *Johnson v. Farlow*, 13 Ired. 84; *Eddleman v. Carpenter*, 7 Jones (N. C.), 616; *Reynolds v. Cathers*, 5 Jones (N. O.), 437; *Tilton v. Emery*, 17 N. H. 536; *Smith v. Montes*, 11 Tex. 24.

<sup>5</sup> *Franklin v. Dorland*, 28 Cal. 175, 180; 87 Am. Dec. 111.

<sup>6</sup> *Allen v. Sayward*, 5 Greenl. 231; 17 Am. Dec. 221; *Fox v. Widgery*, 4 Greenl. 218; *Doane v. Willcutt*, 5 Gray, 333; 66 Am. Dec. 369.

<sup>7</sup> *Comstock v. Smith*, 13 Pick. 116; 23 Am. Dec. 670.



made by a private individual.<sup>1</sup> But in North Carolina, a different view obtains. It is there held that only the title evidenced by matter of record will pass by a grant made by the sovereign power, and hence there can be no estoppel.<sup>2</sup>

§ 949. **Acquisition of title by trustee.** —In order to create an estoppel so as to give the grantee the benefit of a title subsequently acquired by the grantor, such title must be acquired by him in the same right as that in which he made his deed. If the grantor executes a deed in his own right, and afterward acquires a title to the same property as trustee, the doctrine of estopped manifestly can have no application.<sup>3</sup>

§ 950. **General covenant when grantor's interest only conveyed.**—It will be admitted that where a deed, either by recital, admission, covenant, or otherwise, distinctly shows the actual intention of the parties to have been to convey and receive reciprocally a certain estate, they are estopped from denying the operation of the deed in accordance with this intent. But in Oregon a case arose where the grantor conveyed all his right, title, and interest in and to a certain lot, which was properly described. The deed also contains this covenant: "That I am the owner in fee simple of said premises; that they are free from all encumbrances, and that I will warrant and defend the same from all lawful claims whatsoever." The grantor owned, however, only one-half of such lot. An action was brought on the covenant, and the defense

<sup>1</sup> *People v. Society*, 2 Paine, 557; *Carver v. Jackson*, 4 Peters, 87; *Menard v. Massey*, 8 How. 313; *Denn v. Cornell*, 3 Johns. Cas. 174; *Magee v. Hallett*, 22 Ala. 718; *Nieto v. Carpenter*, 7 Cal. 527; *Commonwealth v. Pejepsco*, 10 Mass. 155; *Commonwealth v. Andre*, 3 Pick. 224.

<sup>2</sup> *Taylor v. Shuffold*, 4 Hawks, 116; 15 Am. Dec. 512; *Wallace v. Maxwell*, 10 Ired. 112; 51 Am. Dec. 380; *Candler v. Lunsford*, 4 Dev. & B. 407.

<sup>3</sup> *Sinclair v. Jackson*, 8 Cowen, 587; *Jackson v. Mills*, 13 Johns. 463; *Burchard v. Hubbard*, 11 Ohio, 316; *Jackson v. Hoffman*, 9 Cowen, 271. It is not necessary that the trust should be expressed, as long as it exists: *Kelley v. Jenness*, 50 Me. 455; 79 Am. Dec. 623.

made was that the grantor did not sell all of the lot, but only the right, title, and interest which he then had in the lot, and that the half of the lot was all that was bargained for at the time, and that the covenant related only to this, and was so understood at the time of purchase. The court, however, held that the grantor was estopped from asserting these facts, as the word "premises" used in the covenant referred to the whole of the lot, and not to the one-half.<sup>1</sup> If, however, a person conveys an undivided one-fourth of an estate with a covenant against encumbrances, and as guardian of his minor child, conveys to the same grantee the remaining three-fourths without such covenant, the grantee, if forced to pay an assessment of betterments laid upon the whole estate, which became an encumbrance before the execution of the deeds, can recover from the grantor in an action on the covenant only one-quarter of the amount altogether paid.<sup>2</sup> But a general covenant will not enlarge the title under a deed conveying in terms the grantor's right, title, and interest, but will be confined to the interest of the grantor.<sup>3</sup>

**§ 951. Estoppel of grantee.**—At one time it seems to have been thought that a grantee by accepting the deed

<sup>1</sup> *Bayley v. McCoy*, 8 Or. 259, citing *Van Rensselaer v. Kearney*, 11 How. 325; *Fairbanks v. Williamson*, 7 Greenl. 96; *Jackson ex dem. Monroe v. Parkhurst*, 9 Wend. 209; *Taggart v. Risley*, 4 Or. 235; *Rawle on Covenants*, 388; *Jackson v. Waldron*, 8 Wend. 178. Mr. Chief Justice Kelly dissented, however, considering that the word "premises" did not mean the entire lot, but only the interest sold, and saying that his position was supported by the case of *Sumner v. Williams*, 8 Mass. 162; 5 Am. Dec. 83.

<sup>2</sup> *Smith v. Carney*, 127 Mass. 179.

<sup>3</sup> *Gibson v. Chouteau*, 39 Mo. 536; *Kimball v. Semple*, 25 Cal. 440; *Lee v. Moore*, 14 Cal. 472; *McNear v. McComber*, 18 Iowa, 12; *Bowen v. Thrall*, 28 Vt. 382; *Cummings v. Dearborn*, 56 Vt. 441; *Marsh v. Fish*, 66 Vt. 213; *Hanrick v. Patrick*, 119 U. S. 156; *Bates v. Foster*, 59 Me. 157; 8 Am. Rep. 406; *Bryan v. Uland*, 101 Ind. 477; *Locke v. White*, 89 Ind. 492; *Habig v. Dodge*, 127 Ind. 31; *Reynolds v. Shaver*, 59 Ark. 299; 43 Am. St. Rep. 36; *Koenig v. Branson*, 73 Mo. 634; *Stockwell v. Couillard*, 129 Mass. 231; *Blanchard v. Brooks*, 12 Pick. 47; *Allen v. Holton*, 20 Pick. 458.

of his grantor, admitted the validity of his title, and could not show that it was defective for the purpose of defeating the wife's right to dower.<sup>1</sup> But the principle is now firmly established that the grantee is not estopped by the acceptance of a deed from disputing the grantor's title, either as against the grantor or anyone else.<sup>2</sup>

**§ 952. What covenants will create an estoppel.**—An estoppel, of course, will arise from a covenant of warranty, and in a majority of the States it is held that not only will it create an estoppel, but will have the effect of actually transferring the estate.<sup>3</sup> When the only covenant in the deed is that for further assurance, this has been considered in Wisconsin and Illinois as possessing the same power for the purpose of creating an estoppel as the covenant of warranty;<sup>4</sup> but in Minnesota and Missouri it is

<sup>1</sup> *Collins v. Torry*, 7 Johns. 278; 5 Am. Dec. 273; *Bowne v. Potter*, 17 Wend. 164; *Hitchcock v. Harrington*, 6 Johns. 290; 5 Am. Dec. 229; *Sherwood v. Vandenburg*, 2 Hill, 308; *Hamblin v. Bank of Cumberland*, 19 Me. 69; *Gayle v. Price*, 5 Rich. 525; *Stimpson v. Thomaston Bank*, 28 Me. 259; *Hains v. Gardner*, 1 Fairf. 383; *Davis v. Darrow*, 12 Wend. 65.

<sup>2</sup> *Sparrow v. Kingman*, 1 Comst. 245; *Finn v. Sleight*, 8 Barb. 406; *Gardner v. Greene*, 5 R. I. 104; *Clee v. Seaman*, 21 Mich. 287; *Blair v. Smith*, 16 Mo. 273; *Macklot v. Dubreuil*, 9 Mo. 483; 43 Am. Dec. 550; *Cutler v. Waddingham*, 33 Mo. 282; *Joeckel v. Easton*, 11 Mo. 118; 47 Am. Dec. 142; *Landes v. Perkins*, 12 Mo. 239; *Porter v. Sullivan*, 7 Gray, 441; *Kingman v. Sparrow*, 12 Barb. 208; *Averill v. Wilson*, 4 Barb. 180. Although the covenantor may have obtained a discharge in bankruptcy, the estoppel arising from his covenants will continue to operate upon the estate: *Stewart v. Anderson*, 10 Ala. 510; *Bush v. Cooper*, 26 Miss. 599; 59 Am. Dec. 270; *Dorsey v. Gassaway*, 2 Har. & J. 411; 3 Am. Dec. 557; *Chamberlin v. Meeder*, 16 N. H. 384.

<sup>3</sup> *Kimball v. Blaisdell*, 57 N. H. 533; 22 Am. Dec. 476; *Thomas v. Stickle*, 32 Iowa, 72; *Kennedy v. McCartney*, 4 Port. 141; *Hoyt v. Dimon*, 5 Day, 479; *Thorndike v. Norris*, 4 Fost. (N. H.) 454; *Dudley v. Caldwell*, 19 Conn. 226; *Jackson v. Winslow*, 9 Cowen, 18; *Somes v. Skinner*, 3 Pick. 52; *Dickerson v. Talbot*, 14 Mon. B. 65; *Jones v. King*, 25 Ill. 384; *Lawry v. Williams*, 13 Me. 281; *Davis v. Keller*, 5 Rich. Eq. 434; *Baxter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49; *Williams v. Thurlow*, 31 Me. 395; *Blake v. Tucker*, 12 Vt. 44; *Ruggles v. Barton*, 13 Gray, 506.

<sup>4</sup> *Pierce v. Milwaukee R. R.*, 24 Wis. 553; 1 Am. Rep. 203; *Bennett v. Waller*, 23 Ill. 183.

regarded as creating only an equity in favor of the grantee, which he may enforce by proper proceedings so as to avail himself of the after-acquired title.<sup>1</sup> Attention has already been called to the fact that in some of the States, the covenants for seisin and good right to convey are satisfied by the transfer of a tortious seisin, but in Mississippi and New Hampshire, covenants for good right to convey and for quiet enjoyment will create an estoppel, so as to affect a subsequently acquired title.<sup>2</sup>

§ 953. **Implied covenants.**—At common law a covenant of warranty was implied from an exchange of lands. But to create this effect it was necessary to use the word “*escambium*.”<sup>3</sup> So at common law a covenant of warranty was implied from a partition between coparceners.<sup>4</sup> But it seems that in a partition between joint tenants and tenants in common, no such covenant was implied.<sup>5</sup> In many of the States it has been provided by statute that certain covenants shall be implied from the use of certain words in the deed. For instance, in California, the use of the word “grant” in a deed implies, unless restrained by express terms, the following covenants: “(1) That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee. (2) That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person

<sup>1</sup> *Hope v. Stone*, 10 Minn. 141; *Chauvin v. Wagner*, 18 Mo. 531.

<sup>2</sup> *Wightman v. Reynolds*, 24 Miss. 675; *Foss v. Strachm*, 42 N. H. 40.

<sup>3</sup> *Bustard's case*, 4 Coke, 121; *Grimes v. Redmon*, 14 Mon. B. 237; *Dean v. Shelly*, 7 Smith, P. F. 427; 98 Am. Dec. 235. And see *Walker v. Renfro*, 26 Tex. 142.

<sup>4</sup> See *Bustard's case*, 4 Coke, 121; Co. Litt. 174 a; *Walker v. Hall*, 15 Ohio St. 361; 86 Am. Dec. 482; *Feather v. Strohoecker*, 3 Pa. 508; 24 Am. Dec. 342.

<sup>5</sup> *Weiser v. Weiser*, 5 Watts, 279; 30 Am. Dec. 313; *Cashion v. Faina*, 47 Mo. 133; *Rector v. Waugh*, 17 Mo. 26; 57 Am. Dec. 251; *Morris v. Harris*, 9 Gill, 26; *Smith v. Sweringen*, 26 Mo. 567; *Picot v. Page*, 26 Mo. 420. See *Sawyers v. Cator*, 8 Humph. 256, 287; *Patterson v. Lanning*, 10 Watts, 135; 36 Am. Dec. 154; *Seaton v. Barry*, 4 Watts & S. 184.

claiming under him.”<sup>1</sup> Where land is particularly described by metes and bounds, and an enumeration of the quantity of acres is added, the latter is merely a matter of description, and a covenant for quantity will not be implied therefrom, and the covenants for title will apply, not to any particular number of acres, but only to the land contained within the designated boundaries.<sup>2</sup> But if it is apparent from the deed itself that it was intended to assure a particular quantity of land to the purchaser by the covenants, of course they will have this effect.<sup>3</sup>

**§ 954. Restriction of covenants.**—Where there are several covenants having the same object, although they may be distinct, yet restrictive words contained in the first covenant will be construed as extending to all.<sup>4</sup> But a limited covenant subsequently occurring will not restrain the first covenant if the latter is general, unless this be the express intention, or there is an inconsistency between the covenants.<sup>5</sup> Nor will a subsequent limited

<sup>1</sup> Civil Code Cal. § 1113. See *Bryan v. Swain*, 56 Cal. 616; *Lawrence v. Montgomery*, 37 Cal. 183; *Fowler v. Smith*, 2 Cal. 39.

<sup>2</sup> *Rogers v. Peebles*, 72 Ala. 529; *Whitehill v. Gotwalt*, 3 Pa. 327; *Perkins v. Webster*, 2 N. H. 287; *Large v. Penn*, 6 Serg. & R. 488; *Tucker v. Cocke*, 2 Rand. 51; *Roat v. Puff*, 3 Barb. 353; *Bauskett v. Jones*, 2 Spear, 68; *Mann v. Pearson*, 2 Johns. 41; *Lorick v. Hawkins*, 1 Rich. 417; *Davis v. Atkins*, 9 Cush. 13; *Belden v. Seymour*, 8 Conn. 304; 21 Am. Dec. 661; *Ferguson v. Dent*, 8 Mo. 667; *Whallon v. Kauffman*, 19 Johns. 101; *Rickets v. Dickens*, 1 Murph. 343; 4 Am. Dec. 555; *Huntly v. Waddell*, 12 Ired. 33.

<sup>3</sup> *Steiner v. Baughman*, 2 Jones, 106; *Morris v. Owens*, 3 Strob. 190; *Pecare v. Chouteau*, 13 Mo. 527. And see *Kilmer v. Wilson*, 49 Barb. 88; *Long Island R. R. v. Conklin*, 32 Barb. 388.

<sup>4</sup> *Browning v. Wright*, 2 Bos. & P. 13; *Whallon v. Kauffman*, 19 Johns. 98; *Foord v. Wilson*, 8 Taunt. 543; *Davis v. Lyman*, 6 Conn. 252; *Miller v. Heller*, 7 Serg. & R. 32; 10 Am. Dec. 413; *Stannard v. Forbes*, 6 Ad. & E. 572. And see *Howell v. Richards*, 11 East, 633; *Crossfield v. Morrison*, 7 Com. B. 286; *Young v. Raincock*, 7 Com. B. 310; *Dickinson v. Hoomes*, 8 Gratt. 353; *Estabrook v. Smith*, 6 Gray, 572; 66 Am. Dec. 445; *Bricker v. Bricker*, 11 Ohio St. 240; *Nind v. Marshall*, 1 Brod. & B. 319; *Duval v. Craig*, 2 Wheat. 45; *Norman v. Foster*, 1 Mod. 101; *Bender v. Fromberger*, 4 Dall. 441.

<sup>5</sup> *Rowe v. Heath*, 23 Tex. 619; *Gainsford v. Griffith*, 1 Saund. 58; *Peters v. Grubb*, 9 Harris, 460; *Summer v. Williams*, 8 Mass. 162; 5 Am.

covenant be enlarged by a preceding general covenant.<sup>1</sup> Words of restriction added to one covenant do not affect the generality of others when they are of different kinds and relate to different things.<sup>2</sup>

§ 955. **Liability of covenantor.**—If two or more persons enter into a covenant, the obligation which they assume is generally presumed to be a joint one.<sup>3</sup> To make the liability several, words of severance should be used.<sup>4</sup> Where the common-law restriction upon the power of married women to convey their separate estate prevails, a married woman, by the execution jointly with her husband of a deed with covenants of her estate, does not become liable in damages for a breach of the covenants.<sup>5</sup> Where the covenant runs with the land and the liability of the covenantor is founded on privity of estate, the action is local in its character, and the land must be

Dec. 83. And see *Cornell v. Jackson*, 3 Cush. 508; *Smith v. Compton*, 3 Barn. & Adol. 189; *Phelps v. Decker*, 10 Mass. 267; *Cole v. Hawes*, 2 Johns. Cas. 203; *Crum v. Lord*, 23 Iowa, 219; *Attorney General v. Purmort*, 5 Paige, 620.

<sup>1</sup> *Trenchard v. Hoskins*, Winch. 91; *Rawle on Covenants* (4th ed.), 519.

<sup>2</sup> *Crayford v. Crayford*, Cro. Car. 106; *Kean v. Strong*, 9 Irish Law, 74.

<sup>3</sup> *Carleton v. Tyler*, 16 Me. 392; 33 Am. Dec. 673; *Donohue v. Emery*, 9 Met. 67; *Comings v. Little*, 24 Pick. 266; *Platt on Covenants*, 117; *Shep. Touchstone*, 375; *Rawle on Covenants* (4th ed.), 536. See *Carthrae v. Browne*, 3 Leigh, 98; 23 Am. Dec. 255; *Bradburne v. Botfield*, 14 Mees. & W. 559; *Anderson v. Martindale*, 1 East, 497.

<sup>4</sup> *Fields v. Squires*, 1 Deady, 366; *Evans v. Sanders*, 10 Mon. B. 291.

<sup>5</sup> *Fowler v. Shearer*, 7 Mass. 21; *Aldridge v. Burlison*, 3 Blackf. 201; *Fletcher v. Coleman*, 2 Head. 388; *Porter v. Bradley*, 7 R. I. 541; *Sumner v. Wentworth*, 1 Tyler, 43; *Wadleigh v. Glines*, 6 N. H. 17; 23 Am. Dec. 705; *Colcord v. Swan*, 7 Mass. 291; *Whitbeck v. Cook*, 15 Johns. 483; 8 Am. Dec. 272; *Falmouth v. Tibbatts*, 16 Mon. B. 641; *Curd v. Dodds*, 6 Bush, 685; *Strawn v. Strawn*, 50 Ill. 37; *Chambers v. Spencer*, 5 Watts, 406; *Nash v. Spofford*, 10 Met. 192; 43 Am. Dec. 425; *Carpenter v. Schermerhorn*, 2 Barb. Oh. 314; *Hempstead v. Easton*, 33 Mo. 146; *Lowell v. Daniels*, 2 Gray, 168; 61 Am. Dec. 448; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Dominick v. Michael*, 4 Sand. 374; *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245; *Nunally v. White*, 3 Met. (Ky.) 593.

within the jurisdiction of the court in which the action is prosecuted.<sup>1</sup>

§ 956. **Covenant to pay mortgage.**—A grantor may sue a grantee who has taken a deed with the stipulation that he will pay a sum due on a certain mortgage then existing on the property.<sup>2</sup> “That covenant,” said Mr. Chief Justice Beasley, “is an absolute one to pay a certain sum of money, and the obligation to pay was entirely disconnected with any act to be done, or with any event to happen in the future. The assumed duty was to pay the stipulated money within a reasonable time, and by the failure in performing that duty the covenant was broken. As, therefore, on the breach of a covenant, the law implies nominal damages at least, actionable misconduct on the part of the defendant is shown in the declaration.” The court held that while the grantor had a cause of action, yet it would not intimate what rate of damages should be awarded to him, as the covenant was to pay the mortgagee and not the grantor.<sup>3</sup>

§ 957. **Failure of title.**—Where there has been no fraud, mistake, or accident, a purchaser who has taken a deed without covenants has no right, for a defect in the title, or for the existence of an encumbrance, to detain the purchase money, or to recover it in case of payment.<sup>4</sup>

<sup>1</sup> *Clark v. Scudder*, 6 Gray, 122; *Birney v. Haim*, 2 Litt. 262; *Lienow v. Ellis*, 6 Mass. 331; *White v. Sanborn*, 6 N. H. 220; *Mostyn v. Fabrigas*, Cowp. 161; 1 Chitty Pleading, 270.

<sup>2</sup> *Golden v. Knapp*, 41 N. J. L. 215.

<sup>3</sup> *Golden v. Knapp*, 41 N. J. L. 215. And see *Wilcox v. Musche*, 39 Mich. 101.

<sup>4</sup> See *Falconer v. Clark*, 3 Md. Ch. 530; 7 Md. 178; *Buckner v. Street*, 15 Fed. Rep. 365; *Soper v. Stevens*, 14 Me. 133; *Peabody v. Phelps*, 9 Cal. 213; *Reese v. Gordon*, 19 Cal. 147; *Young v. Adams*, 6 Mass. 182; *United States Bank v. Bank of Georgia*, 10 Wheat. 333; *Doyle v. Knapp*, 3 Scam. 334; *Cannon v. White*, 16 La. Ann. 89; *Nance v. Elliott*, 3 Ired. Eq. 408; *Commonwealth v. McClanachan*, 4 Rand. 482; *Laughery v. McLean*, 14 Ind. 108; *Lowry v. Brown*, 1 Cold. 457; *Sutton v. Sutton*, 7 Gratt. 238; 56 Am. Dec. 109; *Allen v. Pegram*, 16 Iowa, 172; *Johnson v. Houghton*, 19 Ind. 361; *Starkey v. Neese*, 30 Ind. 224; *Beale v. Sieveley*, 8 Leigh, 658; *Carr v. Roach*, 2 Duer, 20; *Middle Kauf v. Barrick*, 4 Gill.



The prior contract for the purchase is merged in the deed, and resort must be had to that to determine the rights of the parties.<sup>1</sup>

300; *Butman v. Hussey*, 30 Me. 286; *Frost v. Raymond*, 2 Caines, 192; 2 Am. Dec. 228; *Harris v. Morris*, 4 Md. Ch. 530; *Condrey v. West*, 11 Ill. 14<sup>a</sup>; *Brandt v. Foster*, 5 Clarke, 293; *Maney v. Porter*, 3 Humph. 347; *Williamson v. Raney*, 1 Freem. Ch. 114; *Alexander v. McCauley*, 22 Ark. 533; *Butler v. Miller*, 15 Mon. B. 627; *Allen v. Hopson*, 1 Freem. Ch. 276; *Earle v. De Witt*, 6 Allen, 526; *Abbott v. Allen*, 2 Johns. Ch. 519; 7 Am. Dec. 554; *Price v. Neale*, 3 Burr. 1355; *Jones v. Ryde*, 5 Taunt. 488; *Smith v. Mercer*, 6 Taunt. 76.

<sup>1</sup> *Seltzinger v. Weaver*, 1 Rawle, 377; *Ludwick v. Huntzinger*, 5 Watts & S. 51; *Griffith v. Kempshall*, 1 Clarke Ch. 571; *Howes v. Barker*, 3 Johns. 506; 3 Am. Dec. 526; *Coleman v. Hart*, 25 Ind. 256; *Bull v. Willard*, 9 Barb. 642; *Houghtaling v. Lewis*, 10 Johns. 297.

## CHAPTER XXVII

### CONDITIONS, LIMITATIONS, RESERVATIONS, EXCEPTIONS, RESTRICTIONS, AND STIPULATIONS.

- § 958. Distinction between conditions precedent and subsequent.
- § 959. Fee passes upon condition subsequent.
- § 960. Absolute deed with subsequent grant on condition.
- § 961. Subsequent impossibility.
- § 962. Prevention of performance of condition.
- § 963. Condition against sale of intoxicating liquors.
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- § 967. Condition against putting in windows.
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- § 969. Who may take advantage of breach.
- § 970. Conditions subsequent strictly construed.
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- § 975. Appraisement of improvements.
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- § 979. Reservations and exceptions.
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- § 985. Right of way.
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- § 986. Maintenance of tollhouse.
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- § 988. Passageway.

- § 989. Construction in particular cases.
- § 990. Restrictions and stipulations.
- § 990 a. Offensive occupations.
- § 990 b. Building lines.
- § 990 c. Extension of room, window, or piazza.
- § 990 d. Bay windows.
- § 991. Removal of restriction.
- § 991 a. Reasonable construction.
- § 991 b. Public policy.
- § 991 c. Changed conditions of city.

**§ 958. Distinction between conditions precedent and subsequent.**—If land is conveyed upon a condition precedent, the title will not pass until the performance of the condition. But if the condition is subsequent, the title passes at the time at which the deed is executed and delivered.<sup>1</sup> Whether a covenant is to be deemed precedent or subsequent depends upon the intention of the parties as shown by the instrument, and not upon the use of any particular set of technical words.<sup>2</sup> A deed was made with the condition that the grantees should build and maintain a dam over a certain brook crossing the land embraced in the deed, and that such dam with its floodgates and sluiceways might be used by the grantors for hydraulic purposes. It was also covenanted that if the grantors sustained any damages in case of a break in the dam or an overflow, the grantees should not be liable unless the same happened through their gross negligence. In this case, the condition did not necessarily precede the vesting of the estate, but might accompany or follow it, and the court held that the condition was subsequent, and that the deed passed the fee simple subject to be divested by a neglect or refusal to perform the condition.<sup>3</sup> Where an instrument commencing in the ordinary form of a bargain and sale deed, and purporting to convey to the

<sup>1</sup> Sheppard v. Thomas, 26 Ark. 617.

<sup>2</sup> Underhill v. The Saratoga & Washington R. R. Co., 20 Barb. 556; Shinn v. Roberts, 20 N. J. L. (Spencer), 435; 43 Am. Dec. 636; Rogan v. Walker, 1 Wis. 527. This section was quoted as authority in The Bank of Suisun v. Stark, 106 Cal. 202.

<sup>3</sup> Underhill v. The Saratoga & Washington R. R. Co., 20 Barb. 556.

grantees in consideration of a sum of money certain land, and authorizing the grantees to take possession, sell, and convey or lease the property in the name of the grantor, and to receive the purchase money and rent, declared that the grantor would not sell the property or revoke the power unless the grantees neglected to pay the sum specified, and contained a covenant that if payment was made at the stipulated time the instrument should operate as a full conveyance, which effect it should also have if the grantor failed to fulfill his part of the agreement, such instrument is intended as a conveyance upon condition precedent. Until performance of the condition, the grantees can acquire no title, but when performed, the grantees' title is complete without further action by the grantor.<sup>1</sup>

**§ 959. Fee passes upon condition subsequent.**—The fee passes by a deed upon a condition subsequent, in the same manner and to the same extent as if the condition did not exist subject to the contingency of being defeated as provided in the condition, the grantor possessing a right of entry upon condition broken.<sup>2</sup> This is true, even where a homestead is conveyed upon condition that the grantee shall make certain specified payments, and the deed provides that when the conditions have been performed the title shall vest in the grantee absolutely.<sup>3</sup> The word "family," where a deed is made on condition that

<sup>1</sup> *Brannan v. Mesick*, 10 Cal. 95. See *Mesick v. Sunderland*, 6 Cal. 297. See, also, *Cheete v. Washburn*, 44 Minn. 312. It is a question of intention whether a condition is precedent or subsequent, and this intention is to be derived from the deed as a whole: *Mesick v. Sunderland*, 6 Cal. 297; *Blacksmith v. Fellows*, 7 N. Y. 401; *Martin v. Ballou*, 13 Barb. 119; *Finlay v. King*, 3 Pet. 346; *Chapin v. School District*, 35 N. H. 445; *Rogan v. Walker*, 1 Wis. 527; *Horne v. Dorrance*, 2 Dall. 304; *Raley v. Umatilla Co.*, 15 Or. 172; 3 Am. St. Rep. 142; 13 Pac. Rep. 890; *Jones v. Chesapeake & O. R. Co.*, 14 W. Va. 514; *Shinn v. Roberts*, 20 N. J. L. 435; 43 Am. Dec. 636; *Osgood v. Abbott*, 58 Me. 73.

<sup>2</sup> *Memphis & Charleston R. R. Co. v. Neighbors*, 51 Miss. 412; *Spect v. Gregg*, 51 Cal. 198. See *Spofford v. True*, 33 Me. 283; 54 Am. Dec. 621; *Evenson v. Webster*, 3 S. Dak. 382; 44 Am. St. Rep. 802.

<sup>3</sup> *The Bank of Suisun v. Stark*, 106 Cal. 202.

the grantor and his family should have free passage from a railroad company, means those living in the grantor's house and under his management, and does not include a granddaughter not living with him.<sup>1</sup> A, who was the owner of a lot, gave a bond to B, by which he obligated himself to convey the lot to B, whenever the latter should convey to A or his assigns a certain other lot. A subsequently executed a deed to C of the lot, on condition that the grantee should convey it to B whenever B tendered a like deed of the lot to be granted as provided in the bond, and took back a mortgage upon it with the same condition inserted. At the same time that C executed the mortgage to A, he executed a warranty deed to B containing the clause "for conditions and obligations see said deed from A to me," but did not receive the other lot in exchange. It was held that A's deed to C passed the title subject only to defeasance upon breach of the condition, and that C's deed to B conveyed the lot subject to the mortgage from C to A.<sup>2</sup> After the breach of a condition subsequent, the estate vested in the grantee is not divested at common law until an actual entry by one having the right to enter for the forfeiture.<sup>3</sup> At the present day an action of ejectment would have the same effect.<sup>4</sup> The waiver of a forfeiture may be inferred from the neglect of the party entitled to the estate to assert his claim in a

<sup>1</sup> *Dodge v. Boston etc. Ry. Co.*, 154 Mass. 299.

<sup>2</sup> *Shattuck v. Hastings*, 99 Mass. 23.

<sup>3</sup> *Willard v. Henry*, 2 N. H. 120; *Osgood v. Abbott*, 58 Me. 73; *Cross v. Carson*, 8 Blackf. 138; 44 Am. Dec. 742; *Hubbard v. Hubbard*, 97 Mass. 188; 93 Am. Dec. 75; *Chalker v. Chalker*, 1 Conn. 79; 6 Am. Dec. 206; *Kenner v. American Contract Co.*, 9 Bush, 202; *Phelps v. Chesson*, 12 Ired. 194. And see *Thomas v. Record*, 47 Me. 500; 74 Am. Dec. 500; *Chapman v. Pingree*, 67 Me. 198; *Guild v. Richards*, 16 Gray, 309; *Memphis R. R. Co. v. Neighbors*, 51 Miss. 412; *Chalker v. Chalker*, 1 Conn. 79; 6 Am. Dec. 206; *Frost v. Butler*, 7 Greenl. 225; 22 Am. Dec. 199.

<sup>4</sup> *Osgood v. Abbott*, 58 Me. 73; *Green v. Pettingill*, 47 N. H. 375; 93 Am. Dec. 444. And see *McKelway v. Seymour*, 29 N. J. L. 321; *Stearns v. Harris*, 8 Allen, 598; *Austin v. Cambridgeport Parish*, 21 Pick. 224; *Tallman v. Snow*, 35 Me. 342; *Canal Co. v. Railroad Co.*, 4 Gill. & J. 1, 121; *Cory v. Cory*, 86 Ind. 567.

reasonable time after the termination of the estate.<sup>1</sup> Where land was conveyed on condition that it should be used for a burying ground, and that the grantee should erect and maintain a fence around the land, and where it was used for the purposes intended for many years, but no fence had ever been erected, and no complaint had ever been made of the failure to build the fence, it was said to be too late for the successor in interest of the grantor to enter for breach of the condition.<sup>2</sup>

**§ 960. Absolute deed with subsequent grant on condition.** — An absolute deed of land conveys the title to the grantee. If the grantor subsequently executes a conveyance to the grantee or the latter's grantee charged with conditions, the conditions can have no operative effect, because there is no estate remaining in the grantor.<sup>3</sup>

<sup>1</sup> *Kenner v. American Contract Co.*, 9 Bush, 202; *Willard v. Henry*, 2 N. H. 120; *Ludlow v. New York etc. R. R.*, 12 Barb. 440; *Hooper v. Cummings*, 45 Me. 359. In the case first cited the court said: "The more modern authorities on the subject of such forfeitures establish the doctrine that it is with the party in whose favor the condition is, or who becomes entitled to the estate by reason of the forfeiture, to say whether the estate shall be forfeited or not; and although the user from which the grant of a public passway may be implied must have continued for a period required to toll the right of entry in ejectment, the waiver of a forfeiture may nevertheless be inferred by reason of the failure of the party entitled to the estate to re-enter or assert some claim in a reasonable time terminating the estate; and particularly in a case where the party to whom the grant is made is permitted to use and make valuable improvements on the premises after the condition is broken. The courts adjudge the waiver of the forfeiture upon the principle that the happening of the condition does not *ipso facto* determine the estate, the same remaining in the grantee, but only subjects it to be defeated at the election of the grantor and his heirs, etc; and for the additional reason that the forfeitures of estates are not favored either in courts of law or equity." See *Jackson v. Chrysler*, 1 Johns. 126; *Doe v. Gladwin*, 6 Q. B. (51 Eng. C. L.) 953; *Williams v. Dakin*, 22 Wend. 209; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 349; *Gray v. Blanchard*, 8 Pick. 284. But a mere acquiescence in the breach of a condition without a license would not constitute a waiver of subsequent breaches: *Hubbard v. Hubbard*, 97 Mass. 192; 93 Am. Dec. 75; *Guild v. Richards*, 16 Gray, 326; *Andrews v. Senter*, 32 Me. 397; *Gray v. Blanchard*, 8 Pick. 284; *Cleveland etc. Ry. Co. v. Coburn*, 91 Ind. 557.

<sup>2</sup> *Scovill v. McMahon*, 62 Conn. 378; 36 Am. St. Rep. 350.

<sup>3</sup> *Alemy v. Daly*, 36 Cal. 90.

§ 961. **Subsequent impossibility.** — Conditions subsequent, incapable of execution at the time at which they are made, or subsequently becoming impossible, either by the act of God or of law, do not have the effect of divesting the estate vested in the grantee. As the condition cannot be performed, the grantee is not at fault.<sup>1</sup> If at the time of the execution of an absolute deed the grantee delivers a writing to the grantor, stating that the "deed shall be null and void," unless the grantee shall procure two witnesses to testify to certain things, and that in case he succeeds in obtaining such witnesses the deed shall operate only as a mortgage, the legal title has been conveyed with an unlawful condition subsequent. In such a case the grantor must bear the loss. He can neither in law nor in equity recover the title.<sup>2</sup> But if the grantor purchases the land back, and executes a mortgage as security for the payment of the purchase money, he cannot defeat the enforcement of the mortgage for the reason that the condition subsequent was against public policy, or that there was no consideration.<sup>3</sup> Where a husband and wife, grantors, execute a conveyance with the condition that they shall retain the entire use and control of the property so long as they, or either of them, shall live, a court of equity has power to determine the rights of the parties, and for the purpose of preventing

<sup>1</sup> *Merrill v. Emory*, 10 Pick. 507; *Taylor v. Stratton*, 15 Ga. 103; 60 Am. Dec. 682; *United States v. Arredondo*, 6 Pet. 691; *Hughes v. Edwards*, 9 Wheat. 489; *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682. See *Barksdale v. Elam*, 30 Miss. 694; *Brandon v. Robinson*, 18 Ves. 428; *Blackstone Bank v. Davis*, 12 Pick. 42; 32 Am. Dec. 241; *Jones v. Doe*, 2 Ill. 276; *Bradley v. Peixoto*, 3 Ves. 324; *Gadberry v. Sheppard*, 27 Miss. 203; *Badlam v. Tucker*, 1 Pick. 284; 11 Am. Dec. 202; *Davis v. Gray*, 16 Wall. 203; *Rogers v. Sebastian Co.*, 21 Ark. 440; *Burnham v. Burnham*, 79 Wis. 557; 48 N. W. Rep. 661; *Culin's Appeal*, 20 Pa. St. 243; *Whitney v. Spencer*, 4 Cow. 39; *Jones v. Walker*, 13 B. Mon. 163; 56 Am. Dec. 557; *Randall v. Marble*, 69 Me. 310; 31 Am. Rep. 281; *Jones v. Chesapeake etc. R. R. Co.*, 14 W. Va. 514; *Lamb v. Miller*, 18 Pa. St. 448; *Morse v. Hayden*, 82 Me. 227; *Martin v. Ballou*, 13 Barb. 119; *Parker v. Parker*, 123 Mass. 584; *Wheeler v. Moody*, 9 Tex. 372.

<sup>2</sup> *Patterson v. Donner*, 48 Cal. 369.

<sup>3</sup> *Patterson v. Donner*, 48 Cal. 369.



future complications may decree the execution of a formal conveyance of the fee from the grantors to the grantee, and a reconveyance by the latter for the lives of the grantors.<sup>1</sup> A condition repugnant to the grant is void.<sup>2</sup> Where a deed is made on the condition subsequent that the premises should be used as a cemetery, and an act of the legislature renders further performance of the condition unlawful, the condition is discharged, and the title of the grantee is no longer subject to it.<sup>3</sup>

**§ 962. Prevention of performance of condition.—**Where the grantor prevents the performance of a condition, its nonperformance will be excused.<sup>4</sup> Where a grantor conveyed an undivided third of a tract of land, upon the condition that the grantee should proceed to recover the possession of the lot at his own expense, by legal proceedings, and the grantee employed a competent attorney, who assumed the management of an action then pending against the parties in the possession of the land, and subsequently, on the motion of the grantor, and against the wishes of the grantee and his attorney, another attorney was substituted, who dismissed the action and instituted another in which the possession of the land was recovered, it was held that the actions of the grantor excused the nonperformance of the condition by the grantee.<sup>5</sup>

<sup>1</sup> *Chandler v. Chandler*, 55 Cal. 267.

<sup>2</sup> *Littlefield v. Mott*, 14 R. I. 288; *Pyncheon v. Stearns*, 11 Met. 312; 45 Am. Dec. 210; *Gadberry v. Sheppard*, 27 Miss. 203; *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682; *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404.

<sup>3</sup> *Scovill v. McMahon*, 62 Conn. 378; 36 Am. St. Rep. 350. See, also, *Ricketts v. Louisville etc. Ry. Co.*, 91 Ky. 221; 34 Am. St. Rep. 176.

<sup>4</sup> *Jones v. Chesapeake & Ohio R. R. Co.*, 14 W. Va. 514; *Houghton v. Steele*, 58 Cal. 421, and cases cited; *Jones v. Walker*, 13 B. Mon. 163; 56 Am. Dec. 557; *Mezell v. Burnett*, 4 Jones L. 249; 69 Am. Dec. 744; *Elkhart Car Co. v. Ellis*, 113 Ind. 215; 15 N. E. Rep. 249; *Young v. Hunter*, 6 N. Y. 203; *Leonard v. Smith*, 80 Iowa, 194; *Gray v. Blanchard*, 8 Pick. 284.

<sup>5</sup> *Houghton v. Steele*, 58 Cal. 421. A grantor cannot, after the execution and delivery of a deed, impose conditions, for he then has no estate: *Aleman v. Daly*, 36 Cal. 90. The condition must be expressed in the

**§ 963. Condition against sale of intoxicating liquors.** A condition inserted in a deed that intoxicating liquors shall never be manufactured or sold, or disposed of as a beverage in any place of public resort upon the land conveyed by the deed, and providing that in case of a breach of the condition by the grantee or his assigns, the deed shall become null and void, and the title thereupon shall revert to the grantor, is not repugnant to the estate granted, nor is it unlawful or against public policy.<sup>1</sup> In a suit to obtain the benefit of the forfeiture, the grantee is estopped from denying the validity of the title conveyed by the deed under which he acquired possession.<sup>2</sup> Such a condition, until broken, runs with the land.<sup>3</sup> No forfeiture will occur by reason of a sale which is not chargeable to the fault or negligence of the grantee, and the question of the grantee's knowledge or negligence is one of fact.<sup>4</sup> A condition of this character is a condition subsequent.<sup>5</sup>

**§ 963 a. Construction of clauses against sale of liquors.**—A condition against the sale of intoxicating

deed or in some writing referring to it: *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *Scantlin v. Garvin*, 46 Ind. 262; *Marshall Co. High School v. Iowa Synod*, 28 Iowa, 360; *Schwalbach v. Chicago M. & St. P. Ry. Co.*, 73 Wis. 137; *Moser v. Miller*, 7 Watts, 156; *Galveston etc. Ry. Co. v. Pfeuffer*, 59 Tex. 66; *Gadberry v. Sheppard*, 27 Miss. 203. A deed by referring to another instrument containing a condition may, by reference, adopt the condition: *Bear v. Whisler*, 7 Watts, 144; *Merritt v. Harris*, 102 Mass. 326.

<sup>1</sup> *Cowell v. Springs Co.*, 100 U. S. 55; *Plumb v. Tubbs*, 41 N. Y. 442; *Collins v. Marcy*, 25 Conn. 242; *O'Brien v. Wetherell*, 14 Kan. 616; *Jenks v. Pawlowski*, 98 Mich. 110; 39 Am. St. Rep. 522; *Bad River Lumbering etc. Co. v. Kaiser*, 82 Wis. 116; 33 Am. St. Rep. 29; *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36; 13 Am. St. Rep. 420; *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301; 32 Am. St. Rep. 554; *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391; *Lehigh Coal etc. Co. v. Early*, 162 Pa. St. 338; 29 Atl. Rep. 736; *Odessa Improvement Co. v. Dawson*, 5 Tex. Civ. App. 487.

<sup>2</sup> *Cowell v. Springs Co.*, 100 U. S. 55.

<sup>3</sup> *O'Brien v. Wetherell*, 14 Kan. 616.

<sup>4</sup> *Collins v. Marcy*, 25 Conn. 242. And see, also, *Barrie v. Smith*, 47 Mich. 130.

<sup>5</sup> *Jeffrey v. Graham*, 61 Tex. 481.

liquors, when not inserted in a deed, for an honest purpose, but to enable the grantor to secure a monopoly of the business of liquor selling will not be enforced.<sup>1</sup> A clause: "Provided always, and these presents are upon the express condition that the aforesaid premises shall not be, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind," will be construed as a mere covenant, and not as a condition subsequent, a breach of which will defeat the title.<sup>2</sup> By an agreement not to use a drugstore for the sale of intoxicating liquors, the keeping of a drugstore where liquors are sold in the manner usual with druggists, but not to be drunk upon the premises, is not prohibited.<sup>3</sup> Where one parcel of land is conveyed with a restriction against the sale of intoxicating liquors, and the grantor subsequently conveys adjoining land to another without such restriction, he waives the right to enforce the restriction contained in the first deed, even though the omission of the restriction in the second deed was by mistake, if no step has been taken to correct the mistake.<sup>4</sup> Such a condition is valid, though such sales are not illegal.<sup>5</sup>

**§ 964. Conditions precedent.**—A condition precedent is one that must take effect before the estate can vest. If a condition precedent is impossible from the beginning, or for any reason incapable of performance, the estate will not vest.<sup>6</sup> A condition "that this deed is to have effect and be operative only upon the express condition

<sup>1</sup> *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36; 13 Am. St. Rep. 420.

<sup>2</sup> *Post v. Weil*, 115 N. Y. 361; 12 Am. St. Rep. 809.

<sup>3</sup> *Hall v. Solomon*, 61 Conn. 476; 29 Am. St. Rep. 218.

<sup>4</sup> *Jenks v. Pawlowski*, 98 Mich. 110; 39 Am. St. Rep. 522.

<sup>5</sup> *Smith v. Barrie*, 56 Mich. 314; 56 Am. Rep. 391.

<sup>6</sup> *Harvey v. Aston*, 1 Atk. 374; *Vanhorne's Lessee v. Dorrance*, 2 Dall. 317; *Mizell v. Burnett*, 4 Jones (N. O.), 249; 69 Am. Dec. 744; *Martin v. Ballou*, 18 Barb. 119; *Taylor v. Mason*, 9 Wheat. 325. And see *Bertie v. Falkland*, Freem. Ch. 220; *Scott v. Tyler*, 2 Bro. C. C. 431; *Dunlap v. Mobley*, 71 Ala. 102.

and understanding" that certain things shall first be done, is a condition precedent.<sup>1</sup> Where a father executes a deed of gift of eight undivided ninths of a tract of land, reserving to himself one-ninth, to be laid out on the portion on which he resided, the actual location of the ninth so reserved is not a condition precedent to the operation of the deed as to the undivided portions conveyed to the children.<sup>2</sup> Where a deed of a block of land to a city, to be kept as an ornamental square, and for the erection of public buildings, contains this proviso: "Provided the city, by its legal representatives, obtains authority from the legislature of this State, and makes the necessary removals of the dead from the said block within twelve months from the first day of January, A. D., 1891," the deed is to be construed as made upon a condition precedent, and if the city fails to perform the condition, no title vests in the city.<sup>3</sup>

**§ 965. Restraint on alienation.**—A condition may be imposed in a deed on the power of alienation in certain cases, as that the land shall not be conveyed before a certain date or to a certain person.<sup>4</sup> But an absolute restriction on the power of alienation or a condition forbidding the marriage of the grantee is void.<sup>5</sup> A condition in a

<sup>1</sup> *Tennessee & Coosa R. R. Co. v. East Alabama Ry. Co.*, 73 Ala. 426.

<sup>2</sup> *Salmon v. Wilson*, 41 Cal. 595.

<sup>3</sup> *Stockton v. Weber*, 98 Cal. 433. See, also, *Jones v. Bramblet*, 2 Ill. 276; *Blean v. Messenger*, 33 N. J. L. 499.

<sup>4</sup> *Attwater v. Attwater*, 18 Beav. 330; *Hunt v. Wright*, 47 N. H. 396; 93 Am. Dec. 451. And see *McWilliams v. Nisley*, 2 Serg. & R. 513; 7 Am. Dec. 654; *Stewart v. Brady*, 3 Bush, 623; *Shackleford v. Hall*, 19 Ill. 212; *Dougal v. Fryer*, 3 Mo. 40; 22 Am. Dec. 458.

<sup>5</sup> *Murray v. Green*, 64 Cal. 363; *McCleary v. Ellis*, 54 Iowa, 311; 37 Am. Rep. 205; *Anglesea v. Church Wardens*, 6 Q. B. 114; *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241; *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682; *Brandon v. Robinson*, 18 Ves. 429; *Hall v. Tuffts*, 18 Pick. 455; *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470; *Williams v. Cowden*, 13 Mo. 211; 53 Am. Dec. 143; *Walker v. Vincent*, 19 Pa. St. 369; *Schermerhorn v. Negus*, 1 Denio, 448; *Willis v. Hiscox*, 4 Mylne & C. 197; *Munroe v. Hall*, 97 N. C. 206; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Pritchard v. Bailey*, 113 N. C. 521; 18 S. E. Rep. 668; *Hardy v. Galloway*, 111 N. C. 519; 32 Am. St. Rep. 828; 15 S. E. Rep.

deed made in consideration of love and affection, conveying an absolute fee, that if the land is not disposed of during the grantee's lifetime it shall revert to the grantor, is repugnant to the grant, and void.<sup>1</sup> A condition that a failure to pay the purchase money shall render the deed void, is not void as repugnant to the grant.<sup>2</sup> A condition in a deed conveying a life estate, with remainder in fee to the grantee's children, or in case of his death, to others, which forbids the grantee to convey his interest, and prohibits the sale of it for his debts, is void.<sup>3</sup> In California, the rule that a condition in restraint of alienation when repugnant to the interest created is void, is laid down in the Civil Code.<sup>4</sup> Where a restraint against alienation is void as against public policy the grantee may convey an absolute title, and his grantee is not estopped by any act or declaration made by him to allege its invalidity.<sup>5</sup>

**§ 966. Restraint upon partition by tenants in common.**—Whether a restraint upon the right of partition by

890; *Yard's Appeal*, 64 Pa. St. 95; *Reifsnyder v. Hunter*, 19 Pa. St. 41; *Doebler's Appeal*, 64 Pa. St. 9; *Oxley v. Lane*, 35 N. Y. 340; *Smith v. Clark*, 10 Md. 186; *Norris v. Hensley*, 27 Cal. 439; *Lawrence v. Singleton*, (Tenn. Oct. 23, 1895), 17 S. W. Rep. 265; *McCleary v. Ellis*, 54 Iowa, 311; 37 Am. Rep. 205; *Mandelbaum v. McDonnell*, 29 Mich. 78; 18 Am. Rep. 61; *Hawley v. Northampton*, 8 Mass. 3; 5 Am. Dec. 66; *Gleason v. Fayerweather*, 4 Gray, 348. See *Sprague v. Edwards*, 48 Cal. 239.

<sup>1</sup> *Case v. Dewire*, 60 Iowa, 442.

<sup>2</sup> *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682.

<sup>3</sup> *McCleary v. Ellis*, 54 Iowa, 311; 37 Am. Rep. 205. A deed contained this clause: "The said J. B. Galloway and wife, Alice L. Galloway, retaining for themselves and their heirs and assigns the right to repurchase said land when sold, the said Jefferson Evans conveying a title for said land either by deed or mortgage to any person without first giving J. B. Galloway and wife and their heirs and assigns the privilege of repurchasing the same, renders this deed null and void, otherwise to remain in full force." This provision was held to be void because it was uncertain as to time and manner of performance, was repugnant to the grant, and was a restraint on the power of alienation: *Hardy v. Galloway*, 111 N. C. 519; 32 Am. St. Rep. 828. See, also, *Tillinghast v. Bradford*, 5 R. I. 205; *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241; *Mebane v. Mebane*, 4 Ired. Eq. 131; 44 Am. Dec. 102.

<sup>4</sup> Civil Code Cal. § 711.

<sup>5</sup> *Prey v. Stanley*, 110 Cal. 423.

tenants in common is a restraint upon the power of alienation or not depends, in a great measure, upon the character of the property and the purposes for which it has been purchased. As an abstract proposition the right to partition is an inseparable incident to ownership, and, in many cases, it has been asserted that every estate in common is subject to partition. This was said in a case in Massachusetts where there was no agreement that partition should not be had, but where the right to partition was resisted on the ground of prescription.<sup>1</sup> But where the use of the property as a whole is essential for the benefit of all, and it has been acquired for a definite purpose, under an agreement that it shall not be divided by partition, the agreement is not subject to the objection that it is a restraint upon alienation, as each tenant may convey his undivided interest. Hence, if land purchased for the site of a hotel to be erected by an association is conveyed to the members forming the association, upon condition that each member and his heirs and assigns shall hold the same in common without partition or division, subject to the articles of the association, such a condition is not repugnant to the estate granted, or void upon grounds of public policy. Each of the grantees is, as against the others, estopped to demand partition.<sup>2</sup> But a covenant by tenants in common that a certain part of their land shall be occupied in common as a yard, by them and their heirs and assigns forever, does not prevent partition of such lot. The right of occupation will remain after partition as it existed previously.<sup>3</sup> And so if a deed conveying an undivided interest in land contains a stipulation that the parties, their heirs and assigns, shall never commence proceedings for the partition of a certain designated part of the land, the stipulation is void because

<sup>1</sup> *Mitchell v. Starbuck*, 10 Mass. 11.

<sup>2</sup> *Hunt v. Wright*, 47 N. H. 396; 93 Am. Dec. 451; *Spaulding v. Woodward*, 53 N. H. 573; 16 Am. Rep. 392; *Avery v. Payne*, 12 Mich. 549.

<sup>3</sup> *Fisher v. Dewerson*, 3 Met. 544. And see *Savage v. Mason*, 3 Cush. 500.

it is an unreasonable restraint of the use and enjoyment of the property.<sup>1</sup>

**§ 967. Condition against putting in windows.**—A condition in a deed of a house that there shall be no windows in it, would, probably, be considered a restriction inconsistent with the estate granted, and hence, void. But a condition that no window shall be placed on a certain side would be valid. A clause in a deed, “provided, however, this conveyance is upon the condition that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises within thirty years from the date hereof,” was construed to be a condition, and not a covenant, giving the grantor a right to re-enter upon a breach.<sup>2</sup>

**§ 968. Use of buildings for certain purposes.**—Where the owner of a block of land divided it into lots, and sold the lots from time to time to different persons, and the deeds contained mutual covenants against the erection of buildings for certain trades, the covenants in the various deeds are for the mutual benefit and protection of all the

<sup>1</sup> *Hæussler v. Missouri Iron Co.*, 110 Mo. 188; 33 Am. St. Rep. 431. Said Thomas, J., for the court: “Restraints and fetters upon the alienation and enjoyment of property are opposed to the common law, and especially to the jurisprudence of to-day, which, in the United States at least, has almost wholly lost the spirit and genius of the federal system and federal tenures: 9 Am. Law Reg., N. S., 393, 457. Primogeniture and estates tail, with all their incidents, find but little favor in the laws of this century. The right of partition is an absolute right which yields to no consideration of hardship or inconvenience: Freeman on Cotenancy and Partition, sec. 443. Anything that militates against this right is repugnant to the essential characteristics of cotenancy: *Mitchell v. Starbuck*, 10 Mass. 11; and the tendency of our times is to greater freedom of sale and transfer of property, unfettered by conditions or limitations of the right of alienation.”

<sup>2</sup> *Gray v. Blanchard*, 8 Pick. 283. And see, *Chapin v. School District*, 35 N. H. 445; *Wood v. County of Oheshire*, 32 N. H. 421; *Gillis v. Bailey*, 21 N. H. 150; s. c. 17 N. H. 18; *Parsons v. Miller*, 15 Wend. 564; *Stuyvesant v. Mayor etc. of New York*, 11 Paige, 414; *Collins v. Marcy*, 25 Conn. 242; *Savage v. Mason*, 3 Cush. 500; *Hooper v. Cummings*, 45 Me. 359.



purchasers of lots in the block.<sup>1</sup> Persons who are not parties to a deed containing a covenant providing against certain constructions which may be offensive to neighboring inhabitants, are, if they have suffered from a breach of it, entitled to relief in equity.<sup>2</sup> An *habendum* in a deed, "to have and to hold for the use of said religious Society of Friends so long as it may be needed for meeting purposes, then said premises to fall back to the original tract," is not broken by a transfer of the church property to neighboring land, where use was still to be made of the premises for meetings.<sup>3</sup> Where a county erects a courthouse and jail on land conveyed to it for county purposes, and afterward the county site is removed to another place, the title of the county is not divested by such removal. The removal is not evidence of the county's intention to abandon the property or to use it for purposes not for the use of the county.<sup>4</sup> In a deed containing the condition, "no buildings which may be erected on said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose, or in any other way than as a dwelling-house, for the term of twenty years," from a day named in the deed, the limitation of time is considered as applying only to the character of occupation, and not to the other conditions.<sup>5</sup>

<sup>1</sup> *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713.

<sup>2</sup> *Gilbert v. Peteler*, 3 N. Y. 165. See *Linzee v. Mixer*, 101 Mass. 512; *Clark v. The Inhabitants of the Town of Brookfield*, 81 Mo. 503; 51 Am. Rep. 243. If a person has agreed not to build flats in a neighborhood, and subsequently purchases land there, it becomes in his hands restricted and limited in its uses by that agreement, and continues subject to the restriction in the hands of a purchaser from him with notice: *Lewis v. Gollner*, 129 N. Y. 227; 26 Am. St. Rep. 516.

<sup>3</sup> *Carter v. Branson*, 79 Ind. 14.

<sup>4</sup> *Poitevent v. Hancock County Supervisors*, 58 Miss. 810.

<sup>5</sup> *Keening v. Ayling*, 126 Mass. 404. See as to the construction of a condition that the premises should be used for the manufacture of cars, *Ellis v. Elkhart etc. Co.*, 97 Ind. 247. The question of the extent to which an agreement that the grantee will use, or abstain from using, the granted premises in a specified manner, was exhaustively considered in

**§ 968 a. Enforcing personal contract of grantor against grantee with notice.**—Although an agreement

the case of *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816. In that case, the owner of forty acres of land was engaged in the business of selling sand therefrom, and he sold a half acre to a grantee under an agreement that the latter should not sell any sand off the premises. The original contract of sale contained an agreement to this effect, and the deed contained this covenant: "Said party of the second part hereby agreeing not to sell any sand off said premises." The grantee conveyed to another, who, notwithstanding his knowledge of the agreement, opened a bed on the premises and commenced to sell sand therefrom. The original grantor brought an action to restrain the sale of sand, and the court, in considering the effect of this stipulation, per Mr. Justice Danforth, said: "Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity, at least, bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land, and so running with the title. It is enough that a purchaser has notice of it; the question in equity being, as is said in *Tulk v. Moxhay*, 11 Beav. 571, 2 Phill. Oh. 774, not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This principle was applied in *Tallmadge v. East River Bank*, 26 N. Y. 105, where the equity in regard to the manner of improvement and occupation of certain land grew out of a parol contract made by the owner with the purchaser, and was held binding upon a subsequent purchaser with notice, although his legal title was absolute and unrestricted. In *Trustees v. Lynch*, 70 N. Y. 446, 26 Am. Rep. 615, the action was brought to restrain the carrying on of business on certain premises in the city of New York, of which the defendant was the owner, upon the ground that the premises were subject to a covenant reserving the property exclusively for dwelling-houses. The court below held, among other things, that the covenant did not run with the land, and that the restriction against carrying on any business on the premises was liable to conflict with the public welfare, and judgment was given for the defendant. Upon appeal it was reversed, and the covenant held to be binding upon a subsequent grantee with notice

made by the owner of land restricting its use, may not be a covenant running with the land, or a legal exception

as well as upon the original covenantor. So the restraint may be against the use of the premises for one or another particular purpose, as that no building thereon 'shall be used for the sale of ale, beer, spirits,' etc., 'or as an inn, publichouse, or beerhouse': *Carter v. Williams* L. R. 9 Eq. Cas. 678. And it is said a man may covenant not to erect a mill on his own lands: *Mitchell v. Reynolds*, 1 P. Wms. 181. Many other instances of restraint might be referred to, and where it is of such a nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business or certain kinds of business, or the erection or nonerection of buildings upon the property, we see no reason to doubt the validity of an agreement fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a personal obligation so insisted upon by a grantor and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice: *Parker v. Nightingale*, 6 Allen, 341, 344; 83 Am. Dec. 632; *Burbank v. Pillsbury*, 48 N. H. 475; nor is it essential that the assignees of the covenantor should be named or referred to: *Morland v. Cook*, L. R. 6 Eq. Cas. 252. In *Tulk v. Moxhay*, 1 Hall & T. 105, it was said that the jurisdiction of the court in such cases is not fettered by the question whether the covenant does or does not run with the land. In that case the purchaser of land, which was conveyed to him in fee simple, covenanted with the vendor that the land should be used and kept in ornamental repair as a pleasure garden, and it was held that the vendor was entitled to an injunction against the assignees of the purchaser to restrain them from building upon the land. Upon the appeal, the chancellor, Cottenham, said: 'I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this court ever since I have known it. Where the owner of a piece of land enters into contract with his neighbor, founded, of course, upon a valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of his jurisdiction to maintain that this court has authority to enforce such a contract. It has never, that I know of, been disputed.' The question before the court was stated to be whether a party taking property with a stipulation to use it in a particular manner will be permitted by the court to use it in a way diametrically opposite to that which the party has stipulated for. 'Of course'—he says—'of course the party purchasing the property which is under such restriction gives less for it than he would have given if he had bought it unencumbered. Can there, then, be anything much more inequitable or contrary to good conscience than that a party who takes property at a less price because it is subject to a restriction should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under

or reservation, still, it may be enforced in equity by injunction against a grantee who did not purchase innocently and in good faith. Thus, a builder of flats and tenement houses contracted for the purchase of a lot with the object of building thereon a tenement house. The street was occupied by private residences, and their owners deeming the contemplated structure would be an injury to them, and failing to induce the builder not to erect such a building, purchased and took an assignment of the contract at a considerable advance over the price originally agreed. They did this for the sole and declared purpose of preventing the erection of flats in the neighborhood, and they purchased the contract upon the oral agreement of the builder, that he would not construct any flats in that immediate neighborhood. The builder, however, soon bought other premises in the neighborhood and commenced the erection of a flat, but when suit was threatened he conveyed the property to his wife in exchange for other property worth considerably less, and as her agent and architect continued the work. The wife

which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding.' And in language very applicable to the case before us he adds: 'Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk.' This case is cited and followed as to restrictive covenants in many cases: *Brown v. Great East. Ry. Co.*, L. R. 2 Q. B. D. 406; *London etc. Ry. Co. v. Gomm*, L. R. 20 Ch. Div. 562, 576. Each case will depend upon its own circumstances, and the jurisdiction of a court of equity may be exercised for their enforcement or refused, according to its discretion: *Trustees v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365; but where the agreement is a just and honest one, its judgment should not be in favor of the wrongdoer. Such seems to us the character of the covenant in question; it is restrictive, not collateral to the land but relates to its use, and upon the facts found the plaintiff is entitled to the equitable relief demanded." The court in the case cited (*Hodge v. Sloan*) distinguish the case from *Brewer v. Marshall*, 19 N. J. Eq. 537; 97 Am. Dec. 679, where the court held that the facts did not justify the interference of a court of equity.

knew all the facts, and took the title in her name for the purpose of assisting her husband to avoid his contract. The court held that the builder might be enjoined from continuing the proposed construction, or using any structure on the land as a flat.<sup>1</sup> Where parties purchase land with notice of a covenant relating to it, but not running with the land, they will not be permitted in equity to perform any act contrary to the true meaning of that covenant.<sup>2</sup> An owner possesses an easement where it is agreed by owners fronting upon a square of land in a city, that certain places laid out upon a map shall remain open as appurtenant to several lots, and if the city in the exercise of the right of eminent domain takes such a lot it must compensate the owner of another lot entitled to such easement for its loss.<sup>3</sup>

**§ 969. Who may take advantage of breach.**—No one can take advantage of a breach of a condition subsequent but the grantor or his heirs. If they do not take steps to enforce a forfeiture of the estate on the ground of a breach of the condition, the title remains unimpaired in the grantee. This rule also prevails where a condition is inserted in a patent or grant made by the government.<sup>4</sup> "In what manner the reserved right

<sup>1</sup> *Lewis v. Gollner*, 129 N. Y. 228; 26 Am. St. Rep. 516.

<sup>2</sup> *Tulk v. Moxhay*, 2 Phill. Ch. 774; *Patching v. Dubbins, Kay*, 1.

<sup>3</sup> *Ladd v. City of Boston*, 151 Mass. 585; 21 Am. St. Rep. 481. In the latter volume there is an extended note upon covenants restricting the use of land, to which the reader is referred for a more elaborate discussion of the subject.

<sup>4</sup> *Schulenberg v. Harriman*, 21 Wall. 44; *Smith v. Brannan*, 13 Cal. 107; *Hooper v. Cummings*, 45 Me. 359; *Towne v. Bowers*, 81 Mo. 491; *De Peyster v. Michael*, 6 N. Y. 506; 57 Am. Dec. 470; *Gray v. Blanchard*, 8 Pick. 284; *Bangor v. Warren*, 34 Me. 324; 56 Am. Dec. 657; *Norris v. Milner*, 20 Ga. 563; *Merritt v. Harris*, 102 Mass. 328. See *Fonda v. Sage*, 46 Barb. 122; *Van Rensselaer v. Ball*, 19 N. Y. 103; *Cross v. Carson*, 8 Blackf. 138; 44 Am. Dec. 742; *Nicoll v. New York & Erie R. R. Co.*, 12 N. Y. 121; *Southard v. Central R. R. Co.*, 2 Dutch. 13; *Dewey v. Williams*, 40 N. H. 222; 77 Am. Dec. 708; *People v. Brown*, 1 Caines, 416; *United States v. Repentigny*, 5 Wall. 267; *Cross v. Carson*, 8 Blackf. 138; 44 Am. Dec. 742; *Butchers and Drovers' Stock Yard Co. v. Louisville & N. R. Co.*, 67 Fed. Rep. 35; *State v. Lake Shore etc. Ry. Co.*, Com. Pl.

of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If a grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement."<sup>1</sup> In the case of a private grant, the heirs of the grantor are entitled, as well as the grantor himself, to take advantage of a breach of the condition.<sup>2</sup> Land was conveyed by husband and wife to a person on condition that the latter should maintain the grantors during their lives, and, in case of a failure to comply with the condition, the land should revert. Subsequently, the husband secured a divorce from his wife, and the grantee declined to maintain her except in her former husband's house. It was held that, while the husband only could enforce a forfeiture, yet the wife could enforce her claim for maintenance as a lien on the land, and that the grantee had no power to make the condition that he sought to impose.<sup>3</sup> Where there has been a breach, if the grantor remains in possession, and has not waived the forfeiture, the title becomes vested in him again.<sup>4</sup> If it is stated in a deed that it is made upon condition that the grantee will, within a certain time from the date of

1 Ohio N. P. 292; 2 Ohio Dec. 300; *Hayward v. Kinney*, 84 Mich. 591; 48 N. W. Rep. 170; *Copeland v. Copeland*, 89 Ind. 29; *Higbee v. Rodeman*, 129 Ind. 244; 28 N. E. Rep. 442; *Boone v. Clark*, 129 Ill. 466; 21 N. E. Rep. 850; *Neimeyer v. Knight*, 98 Ill. 222; *Hooper v. Cummings*, 45 Me. 359; *Piper v. Union Pac. Ry. Co.*, 14 Kan. 568; *McElroy v. Morley*, 40 Kan. 76; *Owsley v. Owsley*, 78 Ky. 257.

<sup>1</sup> *Schulenberg v. Harriman*, 21 Wall. 44, 63, per Mr. Justice Field.

<sup>2</sup> *Jackson v. Topping*, 1 Wend. 388; 19 Am. Dec. 515; *Bowen v. Bowen*, 18 Conn. 535.

<sup>3</sup> *Copeland v. Copeland*, 89 Ind. 29.

<sup>4</sup> *Adams v. Ore Knob Copper Co.*, 4 Hughes C. C. 589.



the conveyance, erect a factory upon the premises, the condition is annexed to the estate, and is not merely the personal covenant of the grantor.<sup>1</sup> Where a deed contains a condition for the support of the grantor during his life, and does not stipulate that the support shall be furnished by the grantee personally, the condition may be performed by some other person.<sup>2</sup> When the grantor is entitled to a reversion of the estate for condition broken, his right is not affected by the fact that the grantee has made outlays. The right of entry is a legal right.<sup>3</sup>

**§ 970. Conditions subsequent strictly construed.—**Conditions subsequent, having the effect in case of a breach to defeat estates already vested, are not favored in law, and hence always receive a strict construction.<sup>4</sup> “A deed will not be construed to create an estate on condition, unless language is used which according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated.” “Conditions

<sup>1</sup> Langley v. Chapin, 134 Mass. 82. In the absence of objection on the part of the grantor, a third party cannot excuse a failure of duty by placing it on the ground of a possible violation of the condition of the grant: Butchers and Drovers' Stockyard Co. v. Louisville & N. R. Co., 67 Fed. Rep. 35.

<sup>2</sup> Joslyn v. Parlin, 54 Vt. 670.

<sup>3</sup> Rowell v. Jewett, 71 Me. 408.

<sup>4</sup> Hunt v. Beeson, 18 Ind. 380; Page v. Palmer, 48 N. H. 385; Hoyt v. Kimball, 49 N. H. 322; Wilson v. Galt, 18 Ill. 431; Laberee v. Carleton, 53 Me. 213; Thompson v. Thompson, 9 Ind. 323; 68 Am. Dec. 638; Ludlow v. New York etc. R. R. Co., 12 Barb. 440; Taylor v. Sutton, 15 Ga. 103; 60 Am. Dec. 682; Weir v. Simmons, 55 Wis. 637; Merrifield v. Cobleigh, 4 Oush. 178; Southard v. Central R. R., 26 N. J. L. 13. And see Board etc. v. Trustees etc., 63 Ill. 204; McKelway v. Seymour, 29 N. J. L. 322; Bradstreet v. Clark, 21 Pick. 389; Voris v. Renshaw, 49 Ill. 432; Gladberry v. Sheppard, 27 Miss. 203; Martin v. Ballou, 13 Barb. 119; McWilliams v. Nisly, 2 Serg. & R. 513; 7 Am. Dec. 654; Crane v. Hyde Park, 135 Mass. 147; Kilpatrick v. Mayor of Baltimore, 81 Md. 179; 48 Am. St. Rep. 509; Emerson v. Simpson, 43 N. H. 475; 82 Am. Dec. 168; Peden v. Chicago etc. Ry. Co., 73 Iowa, 328; 5 Am. St. Rep. 680; Rawson v. School District, 7 Allen, 125; 83 Am. Dec. 670; Cullen v. Sprigg, 83 Cal. 56.



are not to be raised readily by inference or argument.”<sup>1</sup> Where a deed is made upon condition that the grantee shall forever keep up and maintain a fence on the line between the land conveyed and the land of the grantor, a neglect to keep up the fence after the death of the grantee will not forfeit the land.<sup>2</sup> Or, in other words, to bind the heirs or assigns to the performance of a condition subsequent, the condition must expressly mention them.<sup>3</sup> Courts are inclined to construe clauses in a deed as covenants rather than as conditions, when the language employed is capable of being construed as a covenant.<sup>4</sup> Where the clause is a covenant, the legal responsibility for its violation is a liability to respond in damages, while a breach of the condition forfeits the estate.<sup>5</sup>

<sup>1</sup> *Rawson v. Inhabitants of School District etc.*, 7 Allen, 125, 127; 83 Am. Dec. 670.

<sup>2</sup> *Emerson v. Simpson*, 48 N. H. 475; 82 Am. Dec. 168.

<sup>3</sup> *Page v. Palmer*, 48 N. H. 385.

<sup>4</sup> *Hoyt v. Kimball*, 49 N. H. 322; *Thornton v. Trammell*, 39 Ga. 202; *Packard v. Ames*, 16 Gray, 327; *Scovill v. McMahon*, 62 Conn. 378; 36 Am. St. Rep. 350.

<sup>5</sup> *Woodruff v. Water Power Co.*, 10 N. J. Eq. (2 Stockt. Ch.) 489. And see *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Houston v. Spruance*, 4 Har. (Del.) 117; *McCullough v. Cox*, 6 Barb. 386; *Underhill v. Saratoga R. R.*, 20 Barb. 455. When the language used in a deed, which it is claimed creates a condition subsequent, is capable of any other reasonable construction that will uphold the estate conveyed by the deed, courts are inclined to give the language such a construction. For various cases in which, under the circumstances existing in each particular case, the rule has been applied or recognized that conditions subsequent are strictly construed, and are not favored, see *Raley v. Umatilla Co.*, 15 Or. 172; 3 Am. St. Rep. 142; 13 Pac. Rep. 190; *Portland v. Terwilliger*, 16 Or. 465; 19 Pac. Rep. 90; *Coffin v. Portland*, 16 Or. 77; 17 Pac. Rep. 580; *Blanchard v. Detroit etc. R. Co.*, 31 Mich. 43; 18 Am. Rep. 142; *Hammond v. Port Royal etc. Ry. Co.*, 15 S. O. 10; *Hooper v. Cummings*, 45 Me. 359; *Laberee v. Carleton*, 53 Me. 211; *Bray v. Hussey*, 85 Me. 329; 22 Atl. Rep. 220; *Cullen v. Sprigg*, 83 Cal. 56; *Jeffery v. Graham*, 61 Tex. 481; *Jackson v. Silvernail*, 15 Johns. 278; *Craig v. Wells*, 11 N. Y. 315; *Woodworth v. Payne*, 74 N. Y. 196; 30 Am. Rep. 298; *Baker v. Mott*, 78 Hun, 141; *Duryee v. New York*, 96 N. Y. 477; *Graves v. Deterling*, 120 N. Y. 447; *Lyon v. Hersey*, 103 N. Y. 264; *Post v. Weil*, 115 N. Y. 361; 12 Am. St. Rep. 809; *Elyton Land Co. v. South & N. Ala. R. Co.*, 100 Ala. 396; 14 So. Rep. 207; *Woodruff v. Water Power Co.*, 10 N. J. Eq. 489; *Southard v. Cent. Ry. Co.*, 26 N. J. L. 13; *Woodruff v.*

§ 971. **Some instances of construction.**—A deed conveying a fee-simple title to a tract of land contained the clause: "It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square, and that no business or improvements are to be put on the said tract, but that which is immediately connected with the Western and Atlantic Railroad." This clause was construed to be a covenant and not a condition, the remedy for a breach of which was an action for damages.<sup>1</sup> A distinction is

Woodruff, 44 N. J. Eq. 349; 16 Atl. Rep. 4; Lawe v. Hyde, 39 Wis. 345; Wier v. Simmons, 55 Wis. 637; Mills v. Evansville, 58 Wis. 135; 15 N. W. Rep. 133; Greene v. O'Connor, 18 R. I. 56; 25 Atl. Rep. 692; Chapin v. School District, 35 N. H. 445; Emerson v. Simpson, 43 N. H. 475; 82 Am. Dec. 168; Page v. Palmer, 48 N. H. 385; Hoyt v. Kimball, 49 N. H. 322; Scovill v. McMahon, 62 Conn. 378; 36 Am. St. Rep. 350; 26 Atl. Rep. 479; Morrill v. Wabash Ry. Co., 96 Mo. 174; 9 S. W. Rep. 657; Stillwell v. St. Louis & H. Ry. Co., 39 Mo. App. 221; Roanoke Ins. Co. v. Kansas City & S. R. Co., 108 Mo. 50; 17 S. W. Rep. 1000; Weinreich v. Weinreich, 18 Mo. App. 364; Studdard v. Wells, 120 Mo. 25; 25 S. W. Rep. 201; Waterman v. Clark, 58 Vt. 601; 2 Atl. Rep. 578; Palmer v. Ryan, 63 Vt. 227; 22 Atl. Rep. 574; Farnham v. Thompson, 34 Minn. 330; 57 Am. Rep. 59; Chute v. Washburn, 44 Minn. 312; 46 N. W. Rep. 555; Thompson v. Thompson, 9 Ind. 323; 68 Am. Dec. 638; Sumner v. Darrell, 128 Ind. 38; 27 N. E. Rep. 162; Taylor v. Sutton, 15 Ga. 103; 60 Am. Dec. 682; Peden v. Chicago etc. R. Co., 73 Iowa, 328; 5 Am. St. Rep. 680; Chapin v. Harris, 8 Allen, 594; Packard v. Ames, 16 Gray, 327; Merrifield v. Cobleigh, 4 Cush. 178; Ayer v. Emery, 14 Allen, 67; Hadley v. Hadley Mfg. Co., 4 Gray, 140; Sohler v. Trinity Church, 109 Mass. 1; Stone v. Houghton, 139 Mass. 175; Curtis v. Topeka, 43 Kan. 138; 23 Pac. Rep. 98; Ruggles v. Olare, 45 Kan. 662; 26 Pac. Rep. 25; Gallaher v. Herbert, 117 Ill. 160; Boone v. Clark, 129 Ill. 466; Stanley v. Colt, 5 Wall. 119; Glenn v. Davis, 35 Md. 208; 6 Am. Rep. 389.

<sup>1</sup> Thornton v. Trammell, 39 Ga. 202. Brown, C. J., dissented, but Warner, J., in delivering the opinion of the court, said: "The conveyance itself is an *unqualified grant* of the land to the grantee. The *words* of the grantor in conveying the land to the grantee impose *no conditions* upon the latter which would be *compulsory* on him to do any act whatever. Independent of the *understanding* or *covenant of the parties*, as expressed in the deed, there is nothing in this conveyance to distinguish it from any other deed of bargain and sale, conveying an absolute fee simple estate in a tract of land. There being *no condition expressed in the grant* of the land to the grantee, by the grantor, of course there can be no *forfeiture* of the grantee's estate therein for *condition broken*. I the *covenant* of the grantee has been broken, the plaintiffs have an

also to be noticed between a condition and a remainder. By a condition an estate is defeated before its natural termination. A remainder, however, takes effect only on the termination of a preceding estate.<sup>1</sup> A deed of land to a church without designating any use or condition transfers a fee simple. The title does not become divested when the property conveyed is no longer used for religious purposes.<sup>2</sup> A condition subsequent arises from the use of the words "shall indemnify and save harmless."<sup>3</sup> Words used in a deed will not be construed into a condition subsequent when this is not the intention of the parties, nor when they can receive any other reasonable construction.<sup>4</sup> A condition subsequent is created by the use of the words

adequate remedy by an action thereon to recover *damages*." For cases in which clauses containing conditions have been construed, see *Rainey v. Chambers*, 56 Tex. 17; *Owsley v. Owsley*, 78 Ky. 257; *Taylor v. Binford*, 37 Ohio, 262; *Neimeyer v. Knight*, 98 Ill. 222; *Barrie v. Smith*, 47 Mich. 130; *Poitevent v. Hancock County Supervisors*, 58 Miss. 110; *Risley v. McNiece*, 71 Ind. 434; *Drew v. Baldwin*, 48 Wis. 529; *Randall v. Marble*, 69 Me. 310; 31 Am. Rep. 281; *King v. Malone*, 31 Gratt. 514; *Swoll v. Oliver*, 61 Ga. 248.

<sup>1</sup> *Sterns v. Godfrey*, 16 Me. 158.

<sup>2</sup> *Cook v. Leggett*, 88 Ind. 211. See generally *Crane v. Hyde Park*, 135 Mass. 147; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Methodist Episcopal Church v. Old Columbia Public Ground Co.*, 103 Pa. St. 608; *Brown v. Caldwell*, 23 W. Va. 187; 48 Am. Rep. 376; *Mills v. Evansville Seminary*, 58 Wis. 135; *Jeffersonville etc. R. R. Co. v. Harbour*, 89 Ind. 375.

<sup>3</sup> *Michigan State Bank v. Hastings*, 1 Doug. 225; 41 Am. Dec. 549. A clause providing that the grantee shall erect and maintain a division fence is an implied covenant, and not a condition subsequent for a breach of which the land will be forfeited: *Palmer's Executor v. Ryan*, 63 Vt. 227. A condition subsequent is not created by a deed conveying and warranting land to a town for common school purposes: *Higbee v. Rodeman*, 129 Ind. 244. But it may impose a limitation upon the manner in which the property is to be leased: *Curtis v. Board of Education*, 43 Kan. 128.

<sup>4</sup> *Wier v. Simmons*, 55 Wis. 637. A condition subsequent is not created by implication by a statement in a deed that it is made for a special and particular purpose: *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179; 48 Am. St. Rep. 509. See § 838 and notes, *ante*. A clause in a deed that a railroad company should erect a crossing under its track will, in the absence of a clause of forfeiture, or other indication that the parties intended to attach a condition to the grant, be construed as creating an easement and not a condition subsequent: *Stillwell v. Railroad Co.*, 39 Mo. App. 221.

“provided, always, and this deed is upon the express condition,” that the grantee shall maintain a specified system of drainage.<sup>1</sup>

§ 972. **Time for performance of condition.**—Where no limitation is prescribed within which a condition must be performed, it is said that the grantee has his whole lifetime in which to perform it.<sup>2</sup> But where a prompt performance of the condition is essential to give the grantor the entire benefit which it was expected he would obtain, or where the immediate performance of the condition was the consideration inducing the grantor to enter into the agreement, the grantee must perform the condition within a reasonable time, and has not his whole lifetime for its performance.<sup>3</sup> Thus, where a deed is made on condition that the grantee shall build a dwelling-house on the land conveyed, and allow the grantor and his wife to reside there during their joint lives, the condition must be performed within a reasonable time.<sup>4</sup>

§ 973. **Clear proof of forfeiture.**—A condition cannot be extended beyond its terms, and a party who insists upon a forfeiture of an estate for a breach of a condition must bring himself clearly within the terms of the condition.<sup>5</sup> Where a deed contained a condition that the

<sup>1</sup> *Hammond v. Port Royal & Augusta Ry. Co.*, 15 S. C. 10.

<sup>2</sup> See *Hamilton v. Elliott*, 5 Serg. & R. 383.

<sup>3</sup> *Hamilton v. Elliott*, 5 Serg. & R. 375, 383. See *Hayden v. Stoughton*, 5 Pick. 528; *Ross v. Tremain*, 2 Met. 495; *Reed v. Hatch*, 55 N. H. 327; *Fisk v. Ohandler*, 30 Me. 79; *Allen v. Howe*, 105 Mass. 241; *Dickey v. McCullough*, 2 W. & S. 88; *Stuyvesant v. New York*, 11 Paige, 414.

<sup>4</sup> *Hamilton v. Elliott*, 5 Serg. & R. 375.

<sup>5</sup> *Voris v. Renshaw*, 49 Ill. 425. It is said: “When a grantor of land seeks to re-enter for breach of a condition subsequent, he should be required to establish something more than a technical encroachment through the action of strangers without the grantee’s permission. It is not enough to show in this way that the letter of the condition is violated, but it must appear that its true spirit and purpose have been willfully disregarded by the grantee”: *Rose v. Hawley*, 141 N. Y. 366, 378. Said Mr. Chief Justice Cole: “It is elementary law that such conditions are most strongly construed against the grantor, and that a forfeiture will not be enforced unless clearly established”: *Mills v. Evansville*

grantee should not convey the property except by lease for a term of years prior to a day named in the deed, and the grantee subsequently, and within the period limited in the deed, executed a lease of the land conveyed for ninety-nine years, and also at the same time made and delivered to the lessee a bond for an absolute deed, conveying the fee after the expiration of the limitation, and received from the purchaser the purchase price agreed upon, these acts of the grantee, it was held, were not prohibited by the condition, and consequently no forfeiture of the estate resulted.<sup>1</sup>

Seminary, 58 Wis. 135, 140; 15 N. W. Rep. 133. That a forfeiture must be clearly established, see, also, *Hadley v. Hadley Mfg. Co.*, 4 Gray, 140; *Merrifield v. Cobleigh*, 4 Cush. 178; *Bradstreet v. Clark*, 21 Pick. 389; *Crane v. Hyde Park*, 135 Mass. 147; *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682; *Osgood v. Abbott*, 58 Me. 73; *Hooper v. Cummings*, 45 Me. 359; *Laberee v. Carleton*, 53 Me. 211; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Lehigh Coal etc. Co. v. Early*, 162 Pa. St. 338; 34 W. N. C. 501; 29 Atl. Rep. 736; *Hoyt v. Kimball*, 49 N. H. 322; *Newman v. Rutter*, 8 Watts, 51; *Chapin v. School District*, 35 N. H. 445; *Jenkins v. Merritt*, 17 Fla. 304; *Hunt v. Beeson*, 18 Ind. 380; *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *Wilson v. Galt*, 18 Ill. 431; *Lynde v. Hough*, 27 Barb. 415; *Woodworth v. Payne*, 74 N. Y. 196; 30 Am. Rep. 298; *Williams v. Dakin*, 22 Wend. 201; *Ludlow v. New York etc. R. R. Co.*, 12 Barb. 440; *Craig v. Wells*, 11 N. Y. 315; *Barrie v. Smith*, 47 Mich. 130; 10 N. W. Rep. 168; *Waldron v. Toledo etc. Ry. Co.*, 55 Mich. 420; 21 N. W. Rep. 870; *Glenn v. Davis*, 35 Md. 208; 6 Am. Rep. 389; *Southard v. Cent. R. R. Co.*, 26 N. J. L. 13; *McKelway v. Seymour*, 29 N. J. L. 321.

<sup>1</sup> *Voris v. Renshaw*, 49 Ill. 425. Mr. Justice Walker said, in delivering the opinion of the court: "When we apply, then, the strictest rules of law in the language of the books, neither the bond nor the lease was a conveyance of the property. In a legal sense, a bond does not convey any title. It is but an obligation to convey at a future time. It is in no sense a conveyance, and we have seen that where a party is insisting upon the forfeiture of an estate, under a condition of his own creation, he must bring himself clearly within the terms of the condition. We have no right to extend the condition beyond its terms. We cannot say that an act not embraced within the language is within the spirit of the condition, and will be substituted for the act prohibited by the terms of the condition. To do so would be to give a liberal instead of the strictest legal construction. To say that while the condition only imposed a forfeiture by an attempt to convey the property within the limited period, by an instrument capable of conveying it, yet it was forfeited by executing an instrument that does not convey, and all know does not have that effect, would be to give a liberal and not a strict construction."

§ 974. **Distinction between conditions and limitations.**—A limitation determines an estate upon the happening of the event itself, without the necessity of doing any act to regain the estate.<sup>1</sup> “The distinction between an estate upon condition, and the limitation by which an estate is determined upon the happening of some event, is, that in the latter case the estate reverts to the grantor, or passes to the person to whom it is granted by limitation over, upon the mere happening of the event upon which it is limited, without any entry or other act, while in the former, the reservation can only be made to the grantor or his heirs, and an entry upon breach of the condition is requisite to re-vest the estate. The provision for re-entry is therefore the distinctive characteristic of an estate upon condition; and when it is found that by any form of expression the grantor has reserved the right, upon the happening of any event, to re-enter, and thereby re-vest in himself his former estate, it may be construed as such.”<sup>2</sup> Where a condition subsequent is followed by a limitation over in case of a breach of the condition, it becomes a conditional limitation.<sup>3</sup> No one but a grantor or his heirs can take advantage of a breach of a condition. But a

<sup>1</sup> *Guild v. Richards*, 16 Gray, 309; *Osgood v. Abbott*, 58 Me. 73; *Southard v. Central R. R.*, 26 N. J. L. 1. And see *Miller v. Levi*, 44 N. Y. 489; *Henderson v. Hunter*, 59 Pa. St. 340; *People of Vermont v. Society*, 2 Paine, 545; *Wheeler v. Walker*, 2 Conn. 196; 7 Am. Dec. 264.

<sup>2</sup> *Attorney General v. Merrimack Mfg. Co.*, 14 Gray, 586, 612, per Hoar, J. In the case from which this quotation is taken, a deed of a church lot, with the church and the parsonage or minister's house standing thereon, was made “in consideration of one dollar, and for the purpose of supporting divine worship,” *habendum* “so long as they shall use or permit the same to be used, and appropriated to divine worship, and for a residence of the minister of the gospel, and no longer, these being the whole object and intent of the parties in this conveyance”; and the deed reserved a right of re-entry to the grantors, upon failure to comply with the “object and intentions of the parties hereto, as above expressed.” The court held that the estate created was not a conditional limitation, but an estate upon condition, which became absolute by a subsequent release from the grantors.

<sup>3</sup> *Stearns v. Godfrey*, 16 Me. 158. And see, also, relating to this subject *Fifty Associates v. Howland*, 11 Met. 99; *Proprietors etc. v. Grant*, 3 Gray, 142; 63 Am. Dec. 725.

stranger may take advantage of a limitation.<sup>1</sup> Land was conveyed to a railroad company, to be occupied by them for the use of a depot for passengers and freight, and other necessary buildings for the accommodation of the company, and also for the erection of "a house for the temporary reception (other than a public house), for the accommodation, victualing, and lodging of passengers and others," and with the proviso that if the buildings should be used for other purposes, or if the grantees should use any other building within one mile of the premises for the purposes mentioned in the deed, or should use the premises for an inn or tavern, the grantees should forfeit their estate. It was held that a transfer of the property by the grantees to another corporation under legislative sanction, and the selling of refreshments, and occasionally lodging persons in the depot buildings by a person in the employ of the company, did not constitute a breach of the condition.<sup>2</sup> If a piece of land is conveyed to a son by his parents, on the former's agreement that he shall not, without his father's consent, make any changes in the property, or contract any debt that might involve it, and that after his father's death he will divide it with the rest of the property among the father's other children, and the son, without consideration, causes the land to be conveyed to his wife, who has "knowledge of the agreement," the transaction is in fact a deed upon condition subsequent, and the son's estate, on account of the breach of the condition, becomes forfeited.<sup>3</sup> So, where a conveyance is made by parents to a son on the condition that he should support them, it may, upon proof of the breach of the condition, be rescinded by a court of equity.<sup>4</sup>

<sup>1</sup> *People of Vermont v. Society etc.*, 2 Paine, 545; *Southard v. Central R. R.*, 26 N. J. L. 1. And see *Owen v. Field*, 102 Mass. 90.

<sup>2</sup> *Southard v. Central R. R. Co.*, 26 N. J. L. (2 Dutch.) 1.

<sup>3</sup> *Wilson v. Wilson*, 86 Ind. 472.

<sup>4</sup> *Blake v. Blake*, 56 Wis. 392; *De Long v. De Long*, 56 Wis. 514.



**§ 975. Appraisement of improvements.**—The fact that the grantor is compelled to pay for the improvements erected upon the land, does not affect the question of whether a clause in a deed is to be considered a condition or a conditional limitation. “No matter how many events the forfeiture depends upon, nor how many individuals must act in producing them, when all these events concur and coexist, the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual.”<sup>1</sup> A deed conveying a piece of land as a site for a schoolhouse contained the provision: “The conditions of this deed are such that whenever the within-named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever, except such as are described in said within deed, the said grantees forfeit the right, herein conveyed to the within-described premises,” upon the grantor paying to them the appraised value of such buildings as may be erected on the land. The court held that this provision was not a limitation, but a condition subsequent, and that the grantee’s estate<sup>2</sup> would remain unaffected until an entry by the grantor or his heirs, after a breach of the condition, and that the provision for the payment of the appraised value of the buildings did not dispense with the necessity of entering for a breach.<sup>3</sup>

**§ 975 a. Where the estate conveyed is less than the fee.**—Where an estate in fee is not conveyed, the rule that a limitation on the use of the property inconsistent with the title conveyed is void, does not apply.<sup>4</sup> The grantor cannot rescind a deed, in consideration of support for his life, by executing a subsequent conveyance without the consent of the grantee, for the reason that the support has

<sup>1</sup> Warner v. Bennett, 31 Conn. 468, 476.

<sup>2</sup> Warner v. Bennett, 31 Conn. 468.

<sup>3</sup> Pellissier v. Corker, 103 Cal. 516.

been withheld. He must resort to his action either for the value of the support withheld, or to rescind on equitable grounds.<sup>1</sup>

**§ 976. Parol condition.**—Aside from the question of a reformation of a deed in cases where clauses have been omitted by mistake, it is certain that in an action to recover property conveyed by deed on the ground that a condition on which it was made has not been performed, the deed must speak for itself, and a condition cannot be ingrafted upon a deed absolute in form by parol evidence.<sup>2</sup> The ingrafting of a contemporaneous condition on a deed will, in a proper action, be allowed only on clear evidence of fraud, accident, or mistake.<sup>3</sup>

**§ 977. Effect of restriction.**—The property conveyed may be restricted to certain uses. A deed conveyed land by metes and bounds, and at the close of the description contained a clause “conditioned” that no building or erection is ever to be made on the land conveyed, except a dwelling-house and outbuildings for the same, or such other buildings as would not affect the privileges of the grantor to a greater degree than would the erection of such dwelling-house and outbuildings, and conditioned also that no building more than a certain distance beyond the line of the grantor’s house should ever be erected. The clause containing these restrictions was held to constitute neither a condition precedent or subsequent, nor a covenant that the grantee would abide by its terms, but

<sup>1</sup> *McCardle v. Kennedy*, 92 Ga. 198; 44 Am. St. Rep. 85.

<sup>2</sup> *Marshall County High School Co. v. Iowa Evangelical Synod*, 28 Iowa, 360; *Galveston, Harrisburg etc. Ry. Co. v. Pfeuffer*, 56 Tex. 66; *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638; *Scantlin v. Garvin*, 46 Ind. 262; *Moser v. Miller*, 7 Watts, 156; *Schwalbach v. Chicago M. & St. P. Ry. Co.*, 73 Wis. 137; 40 N. W. Rep. 579; *Gadberry v. Sheppard*, 27 Miss. 203.

<sup>3</sup> *East Line & Red River R. R. Co. v. Garrett*, 52 Tex. 133; *Marshall County High School v. Iowa Evangelical Synod*, 28 Iowa, 360; *Hammond v. Port Royal etc. Ry. Co.*, 15 S. O. 10; *Rogers v. Sebastian Co.*, 21 Ark. 440; *Long v. McConnell*, 158 Pa. St. 573; 28 Atl. Rep. 233; *Chapman v. Gordon*, 29 Ga. 250.

that it was a part of the description of the estate conveyed, and showed what rights passed to the grantee, and what were retained by the grantor, and that subsequent purchasers from the grantee could not erect the prohibited buildings.<sup>1</sup>

**§ 978. Deed in consideration of certain agreements.** The courts will not construe an estate to be upon condition, if the language of the deed will admit of any other reasonable interpretation. Thus, a deed made in consideration of a sum of money, and the performance of certain agreements contained in an indenture annexed to the deed, providing for the support of the grantor and his wife, is not a deed upon condition subsequent.<sup>2</sup> Nor does a deed to a town of land which has been used as a burying-place, "for a burying-place forever," in consideration of love and affection, and other valuable considerations, convey an estate upon a condition subsequent.<sup>3</sup> But where a parcel of land

<sup>1</sup> Fuller v. Arms, 45 Vt. 400. When a party recovers judgment for the permanent injuries sustained by him by the breach of restrictive covenants, a release from such covenants should be decreed: Amerman v. Deane, 132 N. Y. 355; 28 Am. St. Rep. 584.

<sup>2</sup> Ayer v. Emery, 14 Allen, 67.

<sup>3</sup> Rawson v. Inhabitants of School District etc., 7 Allen, 125; 83 Am. Dec. 670. And see Hunt v. Beeson, 18 Ind. 380. In the former case, Mr. Chief Justice Bigelow, in delivering the opinion of the court, said: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled. If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose, or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus, it is said in the Duke of Norfolk's case, Dyer, 138 b, that the words *ex intentione* do not make a condition but a confidence and trust. See, also, Parish v. Whitney, 3 Gray, 516, and Newell v. Hill, 2 Met. 180, and cases cited. But whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed, will not of itself make

is dedicated by the original proprietors of a town for a public square, the municipal authorities cannot sell the land, or divert it to purposes inconsistent with those for which it was dedicated. The grantor retains such an interest in the land as will enable him to enjoin the diversion.<sup>1</sup> If a county buys land for the purpose of erecting on it a courthouse and other buildings, and the deed contains a

that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent, by construction founded on an argument *ab inconvenienti* only, or on considerations of supposed hardship or want of equity. In the light of these principles and authorities, we cannot interpret the words in the deed of the demandant's ancestor, which declare that the premises were conveyed 'for a burying-place forever,' to be words of strict condition. Nor can we gather from them that they were so intended by the grantor. The grant was not purely voluntary. It was only partially so. It was not made solely in consideration of the love and affection which the grantor bore toward the grantees, but also 'for divers other valuable considerations, me moving hereunto.' Previously to the time of the grant, the premises had been used for a burial-place. It is so described in the deed. Under what circumstances this had been done does not appear. It may have been for a compensation. We cannot now know, therefore, that the sole cause or consideration which induced the grantor to convey the estate to the town was, that it should be used for the specific purpose designated in the deed. There can be no doubt of the intent of the grantor that the estate should always be used and appropriated for such purpose. This intent is clearly manifested; but we search in vain for any words which indicate an intention that if the grantees omitted so to use them, and actually devoted them to another purpose, the whole estate should thereupon be forfeited, and revert to the heirs of the grantor. The words in the deed are quite as consistent with an intent by the grantor to repose a trust and confidence in the inhabitants of the town, for whom he declared his affection and love, that they would always fulfill the purpose for which the grant was made, so long as it was reasonable and practicable so to do, as they are with an intent to impose on them a condition which should compel them, on pain of forfeiture, to maintain the premises as a burial-place for all time, however inconvenient or impracticable it might become to make such an appropriation of them. Language so equivocal cannot be construed as a condition subsequent, without disregarding that cardinal principle of real property already referred to, that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication."

<sup>1</sup> Warren v. Mayor of Lyons City, 22 Iowa, 351. "Nothing can be clearer," said Wright, J., "than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another, and that the grantor retains still such an interest therein as entitles him, in a court of equity, to insist upon the execution of the trust

clause stating that the land is sold for that purpose, this clause does not operate to limit or restrain the power of alienation by the county authorities, where the condition that it should be so used was not imposed in the deed.<sup>1</sup> But a deed with the condition that the grantor is "to have a good living" out of the land conveyed during his life, and all other necessary expenses, and the residue is to remain in the hands of the grantee, "that is to say, if the conditions are fully complied with," otherwise the deed is to become "null and void and of no effect," is a deed on condition, and the estate of the grantee in case of default is subject to loss by a re-entry.<sup>2</sup> If the consideration for a deed be one dollar, and the execution of an agreement to give to the grantor, during his life, a certain portion of the crop produced on the land, the performance of this agreement is a condition subsequent.<sup>3</sup> But it is held that a condition is not created by a provision in a deed that the land shall be subject to the maintenance of the grantor. The effect of such an agreement is merely to place a charge upon the land which may be enforced in equity.<sup>4</sup> A municipal corporation acquiring title to land on condition, is subject to the same rules as a private individual. If it acquires land on condition that upon it, within a specified time, it shall erect a building suitable for municipal purposes, it must, for a failure to comply with the condition, allow the land to return to the grantor.<sup>5</sup>

**§ 979. Reservations and exceptions.**—A reservation is of some new thing issuing out of what is granted; an exception is a withdrawal from the operation of the grant

as originally declared and accepted: *Williams v. First Presbyterian Society*, 1 Ohio St. 478; *Barclay v. Howell's Lessee*, 6 Peters, 498; *Webb v. Moler*, 8 Ohio, 548; *Brown v. Manning*, 6 Ohio, 298; 27 Am. Dec. 255."

<sup>1</sup> *Supervisors Warren Co. v. Patterson*, 56 Ill. 111.

<sup>2</sup> *Watters v. Bredin*, 70 Pa. St. 235.

<sup>3</sup> *Leach v. Leach*, 4 Ind. 628; 58 Am. Dec. 642.

<sup>4</sup> *Pownal v. Taylor*, 10 Leigh, 172; 34 Am. Dec. 725.

<sup>5</sup> *Clarke v. Inhabitants of the Town of Brookfield*, 81 Mo. 503; 51 Am. Rep. 243. And see *St. Louis v. Wiggins' Ferry Co.*, 15 Mo. App. 227.

of some part of the thing itself. Says Chancellor Kent: "A reservation is a clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before; but an exception is always a part of the thing granted, or out of the general words and description in the grant. It is repugnant to the deed and void, if the exception be as large as the grant itself. So it is if the excepted part was specifically granted, as if a person grants two acres, excepting one of them. The exception is good when the granting part of the deed is in general terms, as in the grant of a messuage and houses, excepting the barn or dovehouse; or in the grant of a piece of land, excepting the trees or woods; or in the grant of a manor, excepting a close, *ex verbo generali aliquid excipitur*. If the exception be valid, the thing excepted remains with the grantor, with the like force and effect as if no grant had been made."<sup>1</sup> Petroleum is in-

<sup>1</sup> 4 Kent's Com. 468, and cases cited. See, also, *Whitaker v. Brown*, 46 Pa. St. 197; *Craig v. Wells*, 11 N. Y. 315; *Cutler v. Tuffts*, 3 Pick. 272; *Moulton v. Trafton*, 64 Me. 218; *Pyncheon v. Stearns*, 11 Met. 312; 45 Am. Dec. 210; *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 657; *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196; 30 Am. Rep. 672; *State v. Wilson*, 42 Me. 9; *Stackbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Ives v. Van Auken*, 34 Barb. 566; *Munn v. Worrall*, 53 N. Y. 44; 13 Am. Rep. 470; *Brewer v. Hardy*, 22 Pick. 376; 33 Am. Dec. 747; *Doe v. Lock*, 4 Nev. & M. 807; *Winthrop v. Fairbanks*, 41 Me. 311; *Bridger v. Pierson*, 1 Lans. 481; *Pettee v. Hawes*, 13 Pick. 323; *Farnum v. Platt*, 8 Pick. 339; 19 Am. Dec. 330; *Leavitt v. Towle*, 8 N. H. 96; *Choate v. Burnham*, 7 Pick. 274; *Hornbeck v. Westbrook*, 9 Johns. 73; *McDaniel v. Johns*, 45 Miss. 632; *Richardson v. Palmer*, 38 N. H. 212; *Rich v. Zeilsdorff*, 22 Wis. 544; 99 Am. Dec. 81; *Barnes v. Burt*, 38 Conn. 541; *Burr v. Dana*, 22 Cal. 11; *Blanc v. Bowman*, 22 Cal. 23; *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399; *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255; *Jackson v. McKenny*, 3 Wend. 233; 20 Am. Dec. 690; *Klaer v. Ridgway*, 86 Pa. St. 529; *Wiley v. Sidorus*, 41 Iowa, 224; *Sloan v. Lawrence Furniture Co.*, 29 Ohio St. 568; *Lafayette & Wildcat Gravel Road Co. v. Vanclain*, 92 Ind. 153. In *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399, Mr. Chief Justice Shaw, in delivering the opinion of the court, on page 404, says: "As a proper reservation or exception, we think the principle stated is correct—that it must be something out of the estate granted. But we have no doubt that by apt words, even in a deed-poll, a grantor may acquire some right in the estate of the grantee. It is not, however, strictly by way of reservation, but by way of condition or implied covenant, even though the term 'reserving' or 'reservation' is used. If a

cluded under a reservation of all minerals.<sup>1</sup> A reservation is to be construed most strongly against the grantor.<sup>2</sup> But reservations are to be construed as possessing the

grant is made to A, reserving the performance of a duty, to wit, the payment of a sum of money to a third person, for the benefit of the grantor, an acceptance of the grant binds A to the payment of the money: *Goodwin v. Gilbert*, 9 Mass. 510. So, where a demise is made to A, reserving a rent in money or in service, it is not strictly a reservation out of the demised premises; but the acceptance of it raises an implied obligation to pay the money. So we think a grant may be so made as to create a right in the grantee's land in favor of the grantor. For instance, suppose A has close No. 2, lying between two closes, Nos. 1 and 3, of B; and A grants to B the right to lay and maintain a drain from close No. 1 across his close, No. 2, thence to be continued through his own close, No. 3, to its outlet; and A, in his grant to B, should reserve the right to enter his drain, for the benefit of his intermediate close, with the right and privilege of having the waste water therefrom pass off freely through the grantee's close, No. 3, forever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land; but we think it would inure by way of implied grant or covenant, and not strictly as a reservation. It results from the plain terms of the contract."

In *Outler v. Tuffts*, 3 Pick. 277, it is said: "An exception," says Lord Coke, 1 Inst. 47 a, "is ever a part of the thing granted, and of a thing *in esse*, as an acre out of a manor; that is, out of a *general* a part may be excepted, but not part of a certainty, as out of twenty acres, one. Now, in the case before us, the thing granted is certain, that is a moiety of a certain tract of land; an exception, therefore, of one-half of this moiety would be like a grant of twenty acres excepting one. It is not a *reservation*, for that must be of some new right not *in esse* before the grant, as of rent, etc., or perhaps of some pre-existing easement." And see *Corning v. Troy Iron Co.*, 40 N. Y. 209; *Pettree v. Hawes*, 13 Pick. 323; *Richardson v. Palmer*, 38 N. H. 212; *Hurd v. Curtis*, 7 Met. 110; *Whitaker v. Brown*, 46 Pa. St. 197; *Bridger v. Pierson*, 45 N. Y. 601; *Emerson v. Mooney*, 50 N. H. 316; *Bowen v. Conner*, 6 Oush. 132; *Fancy v. Scott*, 2 Man. & R. 335; *Dennis v. Wilson*, 107 Mass. 591; *Greenleaf v. Birth*, 5 Peters, 302; *Barber v. Barber*, 33 Conn. 335; *Sprague v. Snow*, 4 Pick. 54; *Crosby v. Montgomery*, 38 Vt. 238.

<sup>1</sup> *Dudham v. Kirkpatrick*, 101 Pa. St. 36; 47 Am. Rep. 696.

<sup>2</sup> *Klaer v. Ridgway*, 86 Pa. St. 529; *Wiley v. Sidorus*, 41 Iowa, 224; *Jackson v. Hudson*, 3 Johns. 375; 3 Am. Dec. 500; *Jackson v. Gardner*, 8 Johns. 394. Where a deed grants "all the right, title, and interest of the said party of the first part, the same being one-half undivided interest," the deed transfers all the title of the grantor, and the previous words of conveyance are not limited by the expression "being a one-half undivided interest": *McLennan v. McDonnell*, 78 Cal. 273. Reservations are construed most strongly against the grantor: *Grafton v. Moir*, 130 N. Y. 465; 27 Am. St. Rep. 533. Where, under a deed, the grantee is to hold "during the term of her natural life, and after her



force which it is supposed the deed meant that they should possess.<sup>1</sup> A reservation of all minerals, or of the right of mining, must always respect the surface rights of support. The surface is not to be destroyed without some additional authority.<sup>2</sup> Where land is conveyed to trustees to be used as a graveyard, the grantor reserving "the right and privilege to and for the said grantor, and every member of his family or their offspring, to mark off within the boundaries of the above-described lot one square perch of ground in any locality thereof where they may think proper, for their own and separate use forever for the burial of the dead," the privilege reserved is personal to the grantor and his family. It cannot be assigned to a stranger.<sup>3</sup> A reservation must be made to the grantor. But it is considered as made when by it he secures valuable rights, though others may be also benefited.<sup>4</sup>

§ 980. **Construing a reservation as an exception.**—The terms "exception" and "reservation" are often used indiscriminately, and sometimes in a deed what purports to be a reservation has the force of an exception.<sup>5</sup> Mr. Justice Woodward, after reviewing some authorities, says: "Thus it appears, upon sufficient authority, that words of reservation may operate by way of exception, and, to have any effect, must do so when the subject of the reservation is not something newly created, as a rent or other interest

death to revert to me and my heirs," the fee remains in the grantor, and if he should die before the grantor his interest may be sold subject to the life estate: *Clark v. Hillis*, 134 Ind. 421; 34 N. E. Rep. 13. Section 979 was cited as authority in *City of Fort Wayne v. Lake Shore and Michigan Southern Ry. Co.*, 132 Ind. 558, 32 Am. St. Rep. 277, where it was held that where land is conveyed to a railroad company by a city, under a deed reserving the right to cross the tracks with its streets when the city shall have made an addition of certain land thereto, the right cannot be enforced until it has made the addition.

<sup>1</sup> *Hall v. Ionia*, 38 Mich. 493.

<sup>2</sup> *Erickson v. Michigan Land and Iron Co.*, 50 Mich. 604.

<sup>3</sup> *Pearson v. Hartman*, 100 Pa. St. 84. And see *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525.

<sup>4</sup> *Gay v. Walker*, 36 Me. 54; 58 Am. Dec. 734.

<sup>5</sup> *State v. Wilson*, 42 Me. 9; *Whitaker v. Brown*, 46 Pa. St. 197.

strictly incorporeal, but is a thing corporate and *in esse* when the grant is made.”<sup>1</sup> For instance, an owner of land across which a way had been laid out and used by the public for several years conveyed the land, “reserving to the public the use of the way across the same from the county road to the river.” This clause was considered as creating an exception, and as applying to the way then in existence.<sup>2</sup> Where a grantor conveys land, “saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel of land, together with free ingress and egress by wagonroad to haul the coal therefrom as wanted,” the clause operates as an exception, and the grantor retains the entire and perpetual property in the coal.<sup>3</sup> A clause in a deed conveying one-half of a farm, “excepting, however, the reserve of the four rows of apple trees on the north side of the orchard, with a suitable passway to and from the same, and the land on which they stand, also so much of the second growth of ash timber as I shall want for my personal use,” creates an exception.<sup>4</sup>

**§ 980 a. Title founded on an exception.**—There is no material distinction between a title founded on an exception out of a grant and a title arising from a direct grant of the same subject.<sup>5</sup> A parol reservation of a crop, where land is conveyed by a deed of warranty containing no reference to the reservation, is void.<sup>6</sup> An exception is not void for uncertainty, because the boundaries of the land excepted must be shown by evidence.<sup>7</sup> It is competent to dis sever the title to the surface of land and the minerals beneath it, so that the mineral may become a

<sup>1</sup> In *Whitaker v. Brown*, 46 Pa. St. 197.

<sup>2</sup> *State v. Wilson*, 42 Me. 9.

<sup>3</sup> *Whitaker v. Brown*, 46 Pa. St. 197.

<sup>4</sup> *Randall v. Randall*, 69 Me. 338.

<sup>5</sup> *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; 24 Am. St. Rep. 544.

<sup>6</sup> *Carter v. Wingard*, 47 Ill. App. 296; *Damery v. Ferguson*, 48 Ill. App. 224.

<sup>7</sup> *Painter v. Pasadena L. & W. Co.*, 91 Cal. 74.

separate corporeal hereditament, and possession of title to it will be attended with all the attributes and incidents pertaining to the ownership of land. A grant of all the coal beneath a tract of land is an absolute conveyance in fee simple of all the coal, and an exception to the same effect in a grant of the surface can give no greater title.<sup>1</sup>

§ 981. **Reservation by tenants in common.**—Where one of two tenants in common conveys his interest to a stranger, reserving to himself the right to pass and repass over the land to a woodhouse upon an adjoining lot owned by him, the reservation, irrespective of the question as to the propriety of such use, is void. It is an attempt to create a several limited interest in land held in cotenancy.<sup>2</sup>

<sup>1</sup> *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; 24 Am. St. Rep. 544. See, also, *Armstrong v. Caldwell*, 53 Pa. St. 284; *Ryckman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464; *Delaware etc. R. R. Co. v. Sanderson*, 109 Pa. St. 583; 58 Am. Rep. 743; *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448; *City of Scranton v. Phillips*, 94 Pa. St. 15; *Knight v. Indiana etc. Co.*, 47 Ind. 105; *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368; *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305; *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436; *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760; *Riddle v. Brown*, 20 Ala. 412; 56 Am. Dec. 402.

<sup>2</sup> *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 667. Said Hinman, J: "Now it is well settled that one tenant in common can neither sell nor encumber any part of the estate by metes and bounds, so as to prevent such a diversion or distribution as would give the other tenants in common an unencumbered title to the part thus sold or encumbered: *Griswold v. Johnson*, 5 Conn. 363; *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22; *Merrill v. Berkshire*, 11 Pick. 269. Deeds and other conveyances of such property are not merely inoperative against the rights of the other tenants when a partition is made, but they are, as remarked by Judge Hosmer, undoubtedly void, and the other cotenants may at all times so treat them. It follows, then, that unless this reservation or exception is in fact a reservation of a right in the whole passway, that is, a reservation of some aliquot portion of the plaintiff's interest in it, it must, according to this principle, be deemed to be void. But the right of a passway in or through a piece of land is, in its very nature, to be exercised upon a specific part of the land, and it is impossible to conceive in this case of a right in the plaintiff to pass to and from his woodhouse without interrupting and infringing upon the rights of the proprietor, who might have that portion of the gangway which adjoins the woodhouse aperted and set to him. Thus the effect of the attempted reservation of the passway, if valid, would be the same as the granting or deeding to an-

If a tenant in common convey all his estate in the land held in common, a reservation in such deed of his interest in the mines upon the land conveyed is void.<sup>1</sup> Mr. Chief Justice Shaw, after speaking of the rule forbidding one tenant to convey a tract by metes and bounds, said that if the conveyance in question could avail against the other cotenants, the owners of the remainder of the whole estate, "with all its incidents unimpaired, with all its ores and mines unopened and unsevered, would be compellable to divide the soil or general estate with one set of cotenants, and the mines and ores with another or many other sets of cotenants. Such a result would be attended with all the mischief and inconvenience arising from the act of a cotenant, in attempting to convey his undivided part in a particular parcel, instead of an aliquot part in the whole common estate. The same reasons upon which it is held that such a conveyance is void against cotenants, will also avoid the act of a part owner in attempting to parcel out rights in their nature indivisible, in definite portions of the inheritance, as the mines to one and the general estate to another."<sup>2</sup>

**§ 982. Reservation to third person.**—A stranger to a deed cannot take title by reservation.<sup>3</sup> "But it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or 'reserved.'"<sup>4</sup>

other of that part of the gangway which does not adjoin the woodhouse by metes and bounds, and retaining the other portion, with the view of retaining a passway to it, which would be but an attempt to make partition without the co-operation of the other cotenants, and therefore cannot be done."

<sup>1</sup> *Adams v. The Briggs Iron Co.*, 7 Cush. 361. The grantor retains title to timber excepted from the operation of a deed, and he has the implied power to enter, fell, and take it away. The exception has the same effect as if the whole estate had been conveyed, and the grantee had reconveyed the timber to the grantor: *Wait v. Baldwin*, 60 Mich. 622; 1 Am. St. Rep. 551.

<sup>2</sup> *Adams v. Briggs Iron Co.*, 7 Ousb. 361, 370.

<sup>3</sup> *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Littlefield v. Mott*, 14 R. I. 288.

<sup>4</sup> *West Point Iron Co. v. Reymert*, 45 N. Y. 703, per Allen, J.

While a reservation strictly such is ineffectual to create a right in a stranger, it may still have effect. Thus in a deed with covenants for quiet enjoyment occurred the clause: "Reserving always a right of way, as now used, on the west side of the above-described premises, for cattle and carriages, from the public highway to the piece of land now owned by" a certain person. As there was in fact a right of way existing, this clause was construed as creating an exception from the property conveyed.<sup>1</sup>

**§ 983. Reservation of support in deed to trustees.<sup>2</sup>—** If a person conveys all his property to a trustee to be applied to his support and maintenance during life, and upon his death to be divided between his nephews and nieces, and the children of such as had died, the instrument is a deed and not a will. It vests in them an interest which the maker cannot recall.<sup>3</sup> Such an instrument is not prevented from taking effect until the maker's death, by reason of a reservation for his support, comfort, and maintenance during the term of his natural life. A reservation of this character is limited to a specified purpose, and does not give the instrument that ambulatory quality pertaining to wills.<sup>4</sup>

<sup>1</sup> *Bridger v. Pierson*, 45 N. Y. 601.

<sup>2</sup> This section was cited in *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28.

<sup>3</sup> *McGuire v. Bank of Mobile*, 42 Ala. 589. See § 309, *ante*, and notes. See, also, § 854, *ante*. See, also, *Karchner v. Hoy*, 151 Pa. St. 383; *Blank v. Kline*, 155 Pa. St. 613. Mistreatment of the grantor by the grantee is sufficient ground for setting aside a deed made in consideration of support: *Alford v. Alford*, 1 Tex. Civ. App. 245.

<sup>4</sup> *McGuire v. Bank of Mobile*, 42 Ala. 589. This section was cited with approval in *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 28, where Mr. Chief Justice Stone, in delivering the opinion of the court, said: "A declaration of trust, by which the grantor stipulates to hold in trust for himself during life, with remainder to a donee or succession of donees, certainly secures no use, enjoyment, or usufruct to the remainderman during the grantor's life; yet it is a deed and not a will; 1 Bigelow's *Jarman on Wills*, 17, and notes; *Gillham v. Mustin*, 42 Ala. 365. Can a tangible distinction be drawn between such case and a direct conveyance, in form a deed, by which A conveys to B, to take effect at the death of A? The human mind is not content with a distinction that rests on no

§ 984. **Reservation of plants making them personal property.**—As between a vendor and purchaser, a reservation may make plants personal property, as much so as if they had been taken from the ground. For instance, a person sold his interest in land, to which another held the legal title. By an agreement in writing between the vendor and purchaser, the former was allowed a specified time for the removal of some wine plants growing upon the ground. The vendor verbally authorized the holder of the legal title to convey to the purchaser on the payment of a sum of money, and this payment having been made, the holder of the legal title at the purchaser's request conveyed the land to the latter's wife. There was no clause in this deed reserving the wine plants, but the court held that the written reservation was valid, and conferred on the vendor the right to remove the plants within the time given. This right was not affected by the fact that the deed contained no reservation, as it was not executed by the vendor, nor did he give authority for its execution without the reservation.<sup>1</sup>

§ 985. **Right of way.**—Two parties obtained title to their respective pieces of land from the same grantor. In the deed by which the land to one was conveyed was the

substantial difference. Conveyances reserving a life estate to the grantor have been upheld as deeds: 2 Devlin on Deeds, § 983; Robinson v. Schley, 6 Ga. 515; Elmore v. Mustin, 28 Ala. 309; Hall v. Burkham, 59 Ala. 349. In Daniel v. Hill, 52 Ala. 430, 436, this court said: 'A deed may be so framed that the grantor reserves to himself the use and possession during his life, and on his death creates a remainder in fee in a stranger.'" "Almost every conceivable form of conveyance, obligation, or writing by which men attempt to convey, bind, or declare the legal *status* of property, have, even in courts of the highest character, been adjudged to be wills. The form of the instrument stands for but little. Whenever the paper contemplates posthumous operation, the inquiry is, What was intended? 1 Bigelow's Jarman on Wills, 20, 25; Habbergham v. Vincent, 2 Ves. Jr. 204; Jordan v. Jordan, 65 Ala. 301; Daniel v. Hill, 52 Ala. 430; Shepherd v. Nabors, 6 Ala. 631; Kinnebrew v. Kinnebrew, 35 Ala. 638. The intention of the maker is the controlling inquiry, and that intention is to be gathered primarily from the language of the instrument itself: Dunn v. Bank, 2 Ala. 152." See § 309, *ante*.

<sup>1</sup> Ring v. Billings, 51 Ill. 475.

clause: "Said sixteen feet (east) of said house to be kept open as far back as the south end of said house." The other by reason of this reservation claimed a right of way, but it was decided that, as the clause was applicable to other matters, such as obstructing light, air, or the view, a right of way was not reserved.<sup>1</sup> Nor would evidence be admissible for the purpose of aiding in the construction of the deed, by showing that for more than twenty years prior to the acquisition of the title by the grantor of these two parties, that the way had been used.<sup>2</sup>

§ 985 a. **Right to pass reserved merely.**—By a reservation of a right of way over an alleyway, merely the right to pass through it is reserved, and the owner of the land may use it in any manner he wishes, if he does not prevent the reasonable use of the way as a means of passage.<sup>3</sup> Where a right of way is reserved, but not specifically defined, it need only be such as reasonable necessity and convenience for the purpose for which it was created demand.<sup>4</sup> Unless expressly provided otherwise, the owner may build over a right of way if he leaves the ground unobstructed for a reasonable height above. The right to pass and repass does not carry with it the right

<sup>1</sup> *Wilder v. Wheeldon*, 56 Vt. 344.

<sup>2</sup> *Wilder v. Wheeldon*, 56 Vt. 344.

<sup>3</sup> *Grafton v. Moir*, 130 N. Y. 465; 27 Am. St. Rep. 533. See *Kripp v. Curtis*, 71 Cal. 63; *Bodfish v. Bodfish*, 105 Mass. 319; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; 47 Am. Dec. 156. "‘Right of way, in its strict meaning, is the right of passage over another man’s ground’; and in its legal and generally accepted meaning in reference to a *railway*, it is a mere easement in the land of others, obtained by lawful condemnation to public use or by purchase: *Mills on Eminent Domain*, § 110. It would be using the term in an unusual sense by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way”: *Williams v. Western Union Ry. Co.*, 50 Wis. 76.

<sup>4</sup> *Grafton v. Moir*, 130 N. Y. 465; 27 Am. St. Rep. 533; *Bakeman v. Talbot*, 31 N. Y. 366; 88 Am. Dec. 275; *Rexford v. Marquis*, 7 Lans. 249; *Tyler v. Cooper*, 47 Hun, 94; 124 N. Y. 626; *Bliss v. Greeley*, 45 N. Y. 671; 6 Am. Rep. 157; *Atkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100; *Maxwell v. McAtee*, 9 B. Mon. 20; 48 Am. Dec. 409; *Matthews v. Delaware etc. Canal Co.*, 20 Hun, 427; *Spencer v. Weaver*, 20 Hun, 450; *Johnson v. Kinnicutt*, 2 Cush. 153.



to light and air above the passageway.<sup>1</sup> But where the deed provides for a passageway for light and air, and always to be kept open for the purposes named, it conveys the right to the unobstructed passage of light and air from the ground upward.<sup>2</sup>

§ 986. **Maintenance of tollhouse.**—In the conveyance of a farm a strip of land was reserved until a gravel road having its only tollhouse and gate there, should remove its place of collecting toll from the land conveyed. Subsequently the company owning the tollroad erected a second tollhouse and gate at another place. It collected its principal tolls at this place, but still maintained a tollhouse at the old place, at which only a trifling amount was collected. The court held in a suit of ejectment by a subsequent purchaser, that he owned the strip of land and was entitled to its possession. “Looking to the substance and not to the mere form,” said the court, “the event contemplated by this language of the deed had occurred. If the occupation of the land was still beneficial, as a sort of outpost, for the purpose of securing the collection of a greater amount of tolls at the new tollhouse than would probably be collected there if the old one were abandoned, this was not the purpose for which the reservation was made in said deed. The use of the old house for other beneficial purposes than that of gathering tolls at that place, and the collection of a merely nominal amount of tolls there, while the substantial revenue of the corporation was collected at another place, amounted, we think, to a change of the place of collecting toll, such as was contemplated by said deed.”<sup>3</sup>

§ 987. **Unincorporated town.**—As the inhabitants of an unincorporated town are incapable in law of taking an estate in fee, a proviso in a deed reserving to the inhabit-

<sup>1</sup> *Gerrish v. Shattuck*, 132 Mass. 235; *Burnham v. Nevins*, 144 Mass. 88; 59 Am. Rep. 61.

<sup>2</sup> *Brooks v. Reynolds*, 106 Mass. 31.

<sup>3</sup> *Lafayette Wildcat Gravel R. R. Co. v. Vanclain*, 92 Ind. 153.

ants of such a town the right to cut wood on the lands conveyed when not in fence, is void. Even if operative, the right would inure only to the inhabitants of the town living at the time of the grant, as no words of perpetuity are contained in the proviso.<sup>1</sup>

**§ 988. Passageway.**—Where a deed contained the clause, “reserving, however, a privilege to pass and repass through said lot of land to the outer cellarway, and through said way and cellar where it may do the least damage,” it was held that the grantor by this reservation retained the right of passage through the cellar, even when there was no particular necessity for him to be there, and that it was proper to show that he had used the passage through the cellar in a certain manner, without objection from the grantee, in order to determine what the reservation intended.<sup>2</sup>

**§ 989. Construction in particular cases.**—A grantor conveyed land, “excepting and reserving” to himself, his heirs and assigns, “a passageway four feet wide, in, through, and over said premises,” from a street by which the land was bounded to the grantor’s house, on an adjoining piece of land, and the way was subsequently located by the parties on the northerly side of the land conveyed. The grantee dug up the way, and began to build upon and over it. It was held that he had the right to build over the way, if he placed no part of the building upon it, and left it of a reasonable height, and that the grantor was entitled to have the soil of the way restored to its former condition.<sup>3</sup> Land conveyed by deed was described as “all that piece or parcel of land described as follows, to wit, being the northeast quarter of section 32, except forty acres in the southeast corner of said section 32.” The court held that the forty acres excepted did not pass by the deed, and that any technical

<sup>1</sup> Hornbeck v. Westbrook, 9 Johns. 73.

<sup>2</sup> Choate v. Burnham, 7 Pick. 274.

<sup>3</sup> Gerrish v. Shattuck, 132 Mass. 235.

rule of the common law inconsistent with this decision, was not in force in Minnesota.<sup>1</sup> A deed which reserves a road of a certain width to be shut at each end by a bar or gate, reserves only a right of way, and not the fee of the land reserved for a road.<sup>2</sup> Where land is conveyed to a railroad corporation by a deed containing a clause, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide, and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," the clause is construed as a reservation and not an exception. The grantor has by it an estate for life only.<sup>3</sup> The right of wharfing is included in a reservation of all privileges around a lot bounded by tide water.<sup>4</sup> A reservation in the form, "reserving all that part of said lot which is now used and occupied by the Iron Mining Company for railroad or railway purposes," is sufficiently definite and certain, where a portion of the lot was so occupied at the time the deed was executed.<sup>5</sup> Where A conveyed land to B, "reserving all the right that C may have to fasten a dam across said river and to said premises, and all rights said C has in the same," this clause

<sup>1</sup> *Babcock v. Latterner*, 30 Minn. 417. See *Jackson v. Vickory*, 1 Wend. 406; 19 Am. Dec. 522.

<sup>2</sup> *Kister v. Reeser*, 98 Pa. St. 1; 42 Am. Rep. 608. See, also, *Hagan v. Campbell*, 8 Port. 9; 33 Am. Dec. 267. And see *Brown v. Meady*, 10 Me. 391; 25 Am. Dec. 248.

<sup>3</sup> *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196; 30 Am. Rep. 672.

<sup>4</sup> *Parker v. Rogers*, 8 Or. 183.

<sup>5</sup> *Reidinger v. Cleveland Iron Mining Co.*, 39 Mich. 30. And see, also, *Johnson v. Ashland Lumber Co.*, 47 Wis. 326. In *Rockafeller v. Arlington*, 91 Ill. 375, an owner of land had laid out a block and subdivided it into lots, placing stones at the corners of the block. He sold two lots, and, after the purchaser had taken possession, conveyed the whole tract, "excepting five lots in the first block, and second lot in second block, south of the railroad and plankroad, as the same shall be hereafter subdivided into village lots by the grantee or his assigns, said lots having been heretofore sold," by the grantor. The exception in the deed was considered not to be void for uncertainty, and the deed was held not to pass the title to the lots previously sold. For a case in which an excepting clause was held void for uncertainty, see *Ditman v. Clybourn*, 4 Ill. App. 542.

was held to create an exception, and not a reservation; a covenant of seisin in A's deed to B was not broken by reason of C's interests.<sup>1</sup> A clause in a town lot, "saving and excepting the water privileges of a stream known as Trout Brook, to be carried through the said described lot as aforesaid in a raceway," does not confer a right of carrying the waters of the brook across the lot through a flume erected upon trestlework of a height of several feet. The only right conveyed is that of carrying the water through an artificial canal in the earth; the erection of a flume may be restrained by injunction.<sup>2</sup> A stipulation that certain timber excepted from the operation of the deed should be removed within a specified time, does not render the exception conditional on the removal.<sup>3</sup> Where a grantor in a deed conveying five parcels of land inserts the clause, "possession to be given the said grantee of the house and garden above specified (the first parcel) immediately, and one undivided half of all the other tracts of land specified above, reserving the buildings now occupied by myself at my decease," he intends to reserve to himself only the buildings mentioned, and not a life estate in the undivided half of the four parcels of land.<sup>4</sup> If a deed reserves "all the standing wood upon a lot, together with the right to enter and re-

<sup>1</sup> *Stockwell v. Couillard*, 129 Mass. 231.

<sup>2</sup> *Wilder v. De Cou*, 26 Minn. 10. A clause, "reserving a passway from the road aforesaid, over or by said lot to the barn standing on the adjoining lot, being said Mary's (the grantor's) dwelling-house lot," creates a reservation of a right of way to the dwelling-house lot for such objects, as it would be proper to use a way to the barn appurtenant to the dwelling-house. The right of the grantee is not lost by the destruction of the barn, which existed on the lot at the time of the reservation: *Bangs v. Parker*, 71 Me. 458.

<sup>3</sup> *Irons v. Webb*, 41 N. J. L. 203; 32 Am. Rep. 193. See *Perkins v. Stockwell*, 131 Mass. 529.

<sup>4</sup> *Shannon v. Pratt*, 131 Mass. 434. Where the only valuable mineral found in the region at the time of the conveyance was iron ore, a reservation in the deed to the grantor of "all mines and ores of metal that are now or may be hereafter found on said land" will not include marble or serpentine deposits subsequently discovered: *Deer Lake Co. v. Michigan Land etc. Co.*, 89 Mich. 180. Where a store is reserved, sufficient ground therefor is also reserved: *Moulton v. Trafton*, 64 Me. 218.

move the same at any time within three years," and there is nothing in any other part of the deed to indicate that the term "standing wood" is used in a limited sense, trees suitable for timber, as well as trees suitable for fuel, will be included in the reservation.<sup>1</sup>

<sup>1</sup> *Strout v. Harper*, 72 Me. 270. For other cases in which reservations and exceptions have been construed, see *Getchell v. Whittemore*, 72 Me. 393; *Roberts v. Robertson*, 53 Vt. 690; 38 Am. Rep. 710; *Knapp v. Woolverton*, 47 Mich. 292; *Alden's Appeal*, 93 Pa. St. 182; *Kaelle v. Knecht*, 99 Ill. 396; *Perkins v. Stockwell*, 131 Mass. 529; *Williamson v. Yingling*, 80 Ind. 379; *Kuhn v. Farnsworth*, 69 Me. 404; *Moses v. Eagle*, etc. Mfg. Co., 62 Ga. 455; *Hardwick v. Laderoot*, 39 Mich. 419; *Hartley v. Crawford*, 81 \*Pa. St. 478; *Fisher v. Nelson*, 8 Mo. App. 90; *Lewis v. Loomis*, 50 Wis. 497; *Bridger v. Pierson*, 1 Lans. 481; *Hawes v. Louisville*, 5 Bush, 667; *Cheney v. Pease*, 99 Mass. 448; *Dean v. Colt*, 99 Mass. 480; *Sargent v. Hubbard*, 102 Mass. 380; *Sparhawk v. Bagg*, 16 Gray, 583; *Clark v. Cottrell*, 42 N. Y. 527; *Woodcock v. Estey*, 43 Vt. 515; *Farquharson v. McDonald*, 2 Heisk. 404; *McDaniel v. Johns*, 45 Miss. 632; *Cook v. Wesner*, 1 Cin. 249; *Bourgeois v. Thibodaux*, 23 La. Ann. 19; *Oottle v. Young*, 59 Me. 105; *Emerson v. Mooney*, 50 N. H. 315; *Reformed Church v. Schoolcraft*, 5 Lans. 206; *Haynes v. Jackson*, 59 Me. 386; *Arthur v. Case*, 1 Paige, 447; *Swick v. Sears*, 1 Hill, 17; *Ten Brock v. Livingston*, 1 Johns. 357; *Leavitt v. Towle*, 8 N. H. 96; *Rood v. Johnson*, 26 Vt. 64; *Mixer v. Reed*, 25 Vt. 254; *Cathcart v. Chandler*, 5 Strob. 19; *Hay v. Storrs*, *Wright*, 711; *Massey v. Warren*, 7 Jones (N. C.), 143; *Whitted v. Smith*, 2 Jones (N. C.), 36; *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Barb. 484; *Allen v. Scott*, 21 Pick. 25; 32 Am. Dec. 238; *Loomis v. Pingree*, 43 Me. 299; *Louk v. Woods*, 15 Ill. 256; *Blossom v. Ferguson*, 13 Wis. 75; *Cooney v. Hayes*, 40 Vt. 478; 94 Am. Dec. 425; *Rich v. Zeilsdorf*, 22 Wis. 544; 99 Am. Dec. 81; *Ballou v. Harris*, 5 R. I. 419; *Knotts v. Hudrick*, 12 Rich. 314; *Keeler v. Wood*, 30 Vt. 242; *Patterson v. Patterson*, 1 Hayw. (N. C.), 163; *Hays v. Askew*, 5 Jones (N. C.), 63; *City of Cincinnati v. Newell*, 7 Ohio St. 37; *Shoofstall v. Powell*, 1 Grant Cas. 19; *Oathcart v. Bowman*, 5 Pa. St. 317; *Sahl v. Wright*, 6 Pa. St. 433; *Johnson v. Zink*, 52 Barb. 396; *Rose v. Bunn*, 21 N. Y. 274; *Bartlett v. Judd*, 21 N. Y. 200; 78 Am. Dec. 131; *Esty v. Currier*, 98 Mass. 500; *Hodge v. Boothby*, 48 Me. 68; *Hill v. Lord*, 48 Me. 83; *Adams v. Morse*, 51 Me. 497; *Earle v. Dawes*, 3 Md. Ch. 230; *Veall v. Carpenter*, 14 Gray. 126; *Cronin v. Richardson*, 8 Allen, 423; *McDowell v. Brown*, 21 Mo. 57; *Carradine v. Carradine*, 33 Miss. 698; *Ward v. Ward*, Mart. (N. C.) 28; *Evans v. Labaddie*, 10 Mo. 426; *Stratton v. Gold*, 40 Miss. 778; *Logan v. Caldwell*, 23 Mo. 373; *Webster v. Webster*, 33 N. H. 18; 66 Am. Dec. 705; *Turner v. Cool*, 23 Ind. 56; 85 Am. Dec. 449; *Thurston v. Master-son*, 9 Dana, 228; *Howard v. Lincoln*, 12 Me. 122; *Tuttle v. Walker*, 46 Me. 280; *Brown v. Meady*, 10 Me. (1 Fairf.) 391; 25 Am. Dec. 248; *Richardson v. York*, 14 Me. 216; *Ballard v. Butler*, 30 Me. 94; *Farley v. Bryant*, 32 Me. 474; *Moulton v. Faught*, 41 Me. 298; *Cromwell v. Selden*,

**§ 990. Restrictions and stipulations.**—A deed, like any other contract, may contain stipulations and restrictions of various kinds. Courts in construing them will endeavor to ascertain the intention of the parties, and will give effect to such intention when ascertained. Where a railroad company acquired, by a grant from the city, the right and privilege of using four distinct parts of certain streets, by virtue of four distinct paragraphs contained in the deed—in the last paragraph, immediately following the fourth grant, occurring the limitation, “said right and privilege to be enjoyed until” a specified time, the restriction was considered as not applying to the three grants first contained in the deed.<sup>1</sup> Restrictions inserted in a deed as a part of a scheme for a plan of improvement, are not to be deemed conditions in the technical sense, although spoken of as conditions. A forfeiture does not arise from their breach.<sup>2</sup> If a deed contains a restriction that no building shall be placed upon the land within a specified distance of a street, the street, as it existed at the time of the imposition of the restriction, and not as subsequently altered by public authority, is the one to which reference is considered to be made.<sup>3</sup> Where a deed conveyed land

3 N. Y. 253; *Logan v. Caldwell*, 23 Mo. 373; *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255; *Jackson v. Lawrence*, 11 Johns. 191; *Colby v. Colby*, 28 Vt. 10; *Muller v. Boggs*, 25 Cal. 175; *Humphrey v. Humphrey*, 1 Day, 271; *Hart v. Conner*, 25 Conn. 331; *House v. Palmer*, 9 Ga. 497; *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 667; *Everett v. Dockery*, 7 Jones (N. C.), 390; *Altman v. McBride*, 4 Strob. 208; *Hornback v. Westbrook*, 9 Johns. 73; *Daniel v. Veal*, 32 Ga. 589; *French v. Carhart*, 1 Comst. (1 N. Y.) 96; *Bowen v. Conner*, 6 Cush. 132; *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Hurd v. Hurd*, 64 Iowa, 414, *King v. Bishop*, 62 Miss. 553; *Perkins v. Aldrich*, 77 Me. 96; *Foster v. Foss*, 77 Me. 279; *Varner v. Rice*, 44 Ark. 236; *Dunn v. Sanford*, 51 Conn. 443; *Dennison v. Taylor*, 15 Abb. N. O. 439.

<sup>1</sup> *Quincy v. Chicago, Burlington etc. R. R. Co.*, 94 Ill. 537.

<sup>2</sup> *Ayling v. Kramer*, 133 Mass. 12.

<sup>3</sup> *Tobey v. Moore*, 130 Mass. 448. If a deed contains the restriction that the front wall of any building erected on the lot should be set back a distance of twenty-two feet from the street, with the proviso that “steps, windows, porticos, and other usual projections appurtenant thereto are to be allowed in said reserved space of twenty-two feet,” the restriction is violated by the projection of the whole front wall, except

bounded on one side by a street, and on another by a railroad, and contained the clause, "subject to the condition that no building shall ever be placed on that part of the same lying within twenty-five feet of said street, and, also, that the present occupant of a part of the premises near said railroad for a lumberyard shall be allowed the time until October 1st, next, to remove his lumber and evacuate the premises, but no longer without the consent of said grantee," both clauses take effect only by way of restriction. In the absence of evidence that the restriction was imposed for the benefit of other land, it is construed as a personal covenant merely with the grantor.<sup>1</sup> If a deed, in describing the lot of land conveyed, refers to a plan, this reference does not import a stipulation by the grantor against subsequently changing the plan in any respect, in parts not adjacent to the land conveyed.<sup>2</sup> A restriction forbidding the use of a building for the trade of a butcher, or for any "nauseous or offensive trade whatsoever," or for a purpose "which shall tend to disturb the quiet or comfort of the neighborhood," does not prevent the use of the building for the sale of groceries and provisions.<sup>3</sup> But where a deed contains a restriction that no building, with the exception of a dwelling-house,

less than two feet at each end, into the reserved space, into the form of a bay extending up the whole height of the house, with a foundation, roof, and windows. This is true, notwithstanding such projections had been usual in the city for several years, and that the grantor subsequently conveyed lots in the same locality permitting such projections: *Linzee v. Mixer*, 101 Mass. 512.

<sup>1</sup> *Skinner v. Shepard*, 130 Mass. 180. Where a deed contained a restriction that no building should be placed upon the land within ten feet of the street, the erection of a brick wall six feet high, with a coping one foot in height, to be used as a fence or wall on the line of the street, does not violate this restriction: *Nowell v. Academy of Notre Dame*, 130 Mass. 209. For a case in which certain erections were held to be a violation of a restriction, that the front line of the building should be fifteen feet from the street, and "that no dwelling-house or other building shall be erected on the rear of said lot," see *Sanborn v. Rice*, 129 Mass. 387.

<sup>2</sup> *Coolidge v. Dexter*, 129 Mass. 167.

<sup>3</sup> *Tobey v. Moore*, 130 Mass. 448.



shall be erected on the lot, and that such building when erected shall not be used for the purpose of carrying on any offensive trade or calling, the erection of a building and the occupation of the lower story as a retail grocery constitute a violation of the restriction. The use of the building in this manner may be restrained by injunction.<sup>1</sup>

**§ 990 a. Offensive occupations.**—A restriction may be inserted in a deed, prohibiting the use of the premises for classes of business deemed offensive by the grantor.<sup>2</sup> The restriction may prohibit the carrying on of any trade or business.<sup>3</sup> A clause preventing the carrying on of certain kinds of business may also exclude, in general terms, other kinds of business as being offensive, which are not, strictly speaking, nuisances. Thus, the owner of several adjoining lots inserted a stipulation in the deeds when selling them to the purchasers, “for themselves, and their representatives, heirs, and assigns, owners of any of the said lots above described, that no buildings other than dwelling-houses, at least two stories high, of brick or stone, or churches, chapels, or private stables, of the same material, shall be erected on any of said lots; that no livery or other stable shall be erected on lots fronting on Madison Avenue, and that there shall not be allowed, or erected on any part of said lots of land, any tenement house, brewery, or

<sup>1</sup> *Dorr v. Harrahan*, 101 Mass. 531; 3 Am. Rep. 398. This case differs from *Tobey v. Moore*, 130 Mass. 448, in that the grantee was restricted from erecting anything but a dwelling-house. See, also, *Linzee v. Mixer*, 101 Mass. 512. For other cases in which restrictions and stipulations have been construed, see *Higman v. Stewart*, 38 Mich. 513; *Chapman v. Gordon*, 29 Ga. 250; *Hicks v. McGarry*, 38 Mich. 667; *Scott v. Ward*, 13 Cal. 458; *Beals v. Case*, 138 Mass. 138; *Thompson's Appeal*, 101 Pa. St. 225; *Barker v. Barrows*, 138 Mass. 578.

<sup>2</sup> *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713; *Whitney v. Union Ry. Co.*, 11 Gray, 359; 71 Am. Dec. 715; *Cross v. Frost*, 64 Vt. 179; *Rowland v. Miller*, 139 N. Y. 93; *Dorr v. Harrahan*, 101 Mass. 531; *Hall v. Ervin*, 37 Ch. D. 74; *Brouwer v. Jones*, 23 Barb. 153; *Bramwell v. Lacey*, 10 Ch. D. 691; *Gannett v. Albree*, 103 Mass. 372; *Morris v. Tuskaloosa Mfg. Co.*, 83 Ala. 565; *Winnepesaukee Camp Meeting Assn. v. Gordon*, 63 N. H. 505.

<sup>3</sup> *Trustees v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365.

lager beer saloon, tavern, slaughterhouse, forge, furnace, steam engine foundry, carpenter's or carriage or car shop, manufactory of metals, gunpowder, glue, varnish, vitriol, turpentine, ink or matches, or any distillery, or any establishment for dressing hides, skins, or leather, or any museum, theater, circus, or menagerie, nor shall any other buildings be erected, or trade or business carried on upon said lots which shall be injurious or offensive to the neighboring inhabitants; it being expressly agreed that this covenant runs with the land, and is binding on all future owners thereof." A corporation, whose business was that of undertakers, had leased a building upon one of the lots formerly occupied as a dwelling-house, and had fitted it up and was using it for the reception of dead human bodies, their preparation for burial, the holding of autopsies, and for such other purposes as were incident to their business as undertakers. The owner of one of the lots sold brought an action to restrain the violation of the agreement, and the court held that the business was an offensive one within the meaning of the agreement, and that the court could take judicial notice of its nature, and hence granted an injunction.<sup>1</sup> But where a

<sup>1</sup> Rowland v. Miller, 139 N. Y. 93; 34 N. E. Rep. 765. Mr. Justice Earl, in delivering the opinion of the court, said that it would be too narrow a construction to hold that the agreement prohibited only trades or kinds of business which are nuisances *per se*, and continued: "This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood to such people undesirable as a place of residence. It cannot be doubted that the business of the Taylor Company was, within this definition, offensive to the neighboring residents. People of ordinary sensibilities would not willingly live next to a lot upon which such a business is carried on. Any ordinary person desiring to rent such a house as plaintiff's, would not take her house if he could get one just like it, at the same rent, at some other suitable and convenient place. Indeed, her house would be shunned by people generally, who could afford to live in

deed prohibits the carrying on of "any nauseous or offensive business whatever," it is mainly a question of fact whether the erection of a stable comes within the language of the restriction.<sup>1</sup> A deed contained a covenant against using the premises for certain specified businesses, and concluded with the general clause, "or any other manufactory, trade, or business whatsoever which should or might be offensive to the neighboring inhabitants." It was considered that carrying on the business of a coal yard was prohibited by this restriction.<sup>2</sup>

§ 990 b. **Building lines.**—It is a common practice to insert in deeds a restriction that buildings that may be erected shall be distant a specified space from the front line of the lot, and such restrictions are valid. The grantee under such a deed does not acquire an absolute and unqualified title, but it is a part of the title which he accepts, that the use of the land shall be limited and restricted as provided by the deed.<sup>3</sup> "It often happens," says Mr. Justice Soule, "that owners of land, which they design to put into market lots for dwelling-houses, insert in the deeds of the several lots a uniform set of restrictions as to the purposes for which the land may be used,

such an expensive house. The courts can take judicial notice of the offensive character of such a business. Judges must be supposed to be acquainted with the ordinary sentiments, feelings, and sensibilities of the people among whom they live, and hence, in this case, the learned judge, after the character of the business carried on by the Taylor Company had been proved, could have found, as a matter of law, that it was a violation of the restriction agreement without any further proof."

<sup>1</sup> *Whitney v. Union Railway Co.*, 11 Gray, 359; 71 Am. Dec. 715.

<sup>2</sup> *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713. Where the conditions have changed so that the enforcement of the restriction would no longer be of benefit to the person in whose favor it was made, the courts may refuse to enforce it: *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365.

<sup>3</sup> *Reardon v. Murphy*, 163 Mass. 501; *Payson v. Burnham*, 141 Mass. 547; *Linsee v. Mixer*, 101 Mass. 512; *Hamlen v. Werner*, 144 Mass. 396; *Bagnall v. Davies*, 140 Mass. 76; *Peck v. Conway*, 119 Mass. 546; *Attorney General v. Algonquin Club*, 155 Mass. 128; *Sanborn v. Rice*, 129 Mass. 387; *Attorney General v. Williams*, 140 Mass. 329; 54 Am. Rep. 568; *Attorney General v. Gardiner*, 117 Mass. 492.

and as to the portions of it which may be covered by buildings. So far as these restrictions are reasonable in their character, they are upheld and enforced by courts of equity in favor of the original owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to set the restriction at naught."<sup>1</sup> Where the owners of a tract of land lay it out into house lots, and agree among themselves orally that the lots shall be occupied exclusively for dwelling-houses, and in the deed executed by them insert a clause that no buildings shall be erected on the lots except for dwelling-houses only, the grantee is bound by the condition, and he may be prevented by the purchasers of others of the lots from converting a dwelling-house upon his lot into a public eating-house.<sup>2</sup> Restrictions are also frequently inserted

<sup>1</sup> *Sanborn v. Rice*, 129 Mass. 396.

<sup>2</sup> *Parker v. Nightingale*, 6 Allen, 341; 83 Am. Dec. 632. Said Mr. Chief Justice Bigelow: "A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, as exceptions or reservations out of a grant not binding as covenants real running with the land. Nor is it at all material that such stipulations should be binding at law, or that any privity of estate should subsist between parties, in order to render them obligatory, and to warrant equitable relief in case of their infraction. A covenant, though in gross at law, may, nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, a right to an amenity, in the use of an adjoining parcel, by which his own estate may be enhanced in value, or rendered more agreeable as a place of residence. Restrictions and limitations which may be put on property by means of such stipulations, derive their validity from the right which every owner of the fee has to dispose of his estate, either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied. So long as he retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally, and can be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him cannot equitably refuse to fulfill stipulations concerning the premises of which they had notice. It is upon this ground that

in deeds prohibiting the erection of buildings beyond a certain height, and such restrictions are valid.<sup>1</sup>

§ 990 c. **Extension of room, window, or piazza.**—A restriction prohibiting the erection of a building within a specified distance of a line, requires that no part of the building shall project beyond such line.<sup>2</sup> For instance, a restriction in a deed declared that no building should be erected within twenty feet of a certain street. The grantee built a house facing that street, the front wall of which was twenty feet distant from the street; but a part of the roof sloping toward the street was extended to a line about fourteen feet distant from the street covering a piazza, and supported by posts placed six feet from the front wall of the house, and in this part of the house there was also a dormer window by which a room in the second story was extended a distance of three feet from the line of the front wall of the house. It was decided that the portion

courts of equity will afford relief to parties aggrieved by the neglect or omission to comply with agreements respecting real estate after it has passed by mesne conveyances out of the hands of those who were parties to the original contract. A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate, of which he had notice when he became the purchaser. In such cases, it is true that the aggrieved party can often have no remedy at law. There may be neither privity of estate, nor privity of contract, between himself and those who attempt to appropriate property in contravention of the use or mode of enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him. But it is none the less contrary to equity that those to whom the estate comes, with notice of the rights of another respecting it, should willfully disregard them, and, in the absence of any remedy at law, the stronger is the necessity for affording in such cases equitable relief, if it can be given consistently with public policy, and without violating any absolute rule of law." See, also, *Whittenton Mfg. Co. v. Staples*, 164 Mass. 320; *Whitney v. Union Railway Co.*, 11 Gray, 359; 71 Am. Dec. 715.

<sup>1</sup> *Keening v. Ayling*, 126 Mass. 404; *Smith v. Bradley*, 154 Mass. 227; *Hobson v. Cartwright*, 93 Ky. 368.

<sup>2</sup> *Bagnall v. Davies*, 140 Mass. 76; *Attorney General v. Williams*, 140 Mass. 329; 54 Am. Rep. 468; *Payson v. Burnham*, 141 Mass. 547; *Manners v. Johnson*, 1 Ch. Div. 673.

of the roof and dormer window extending beyond the front line of the building was an extension of the building, and prohibited by the restriction in the deed.<sup>1</sup> So, in another case, where the restriction was: "No building erected on said premises shall be placed at a less distance than twenty feet from the said easterly line of Parsons street," and the front line of the main body of the house was twenty feet from the street but attached to the house, and extending along the entire front was a piazza, about eight feet wide and having a roof supported by posts, it was considered that the whole of the piazza was within the terms of the restriction.<sup>2</sup>

**§ 990 d. Bay windows.**—Bay windows are also considered as parts of a building.<sup>3</sup> A deed contained this clause: "It is further agreed that the building or buildings that shall be erected on the said lot shall be of brick and set the same distance back from Third street, as the house now erected on the southwest corner of Third and Oak streets, and shall be suitable dwellings for the neighborhood." The court construed this clause as requiring that the front wall only of each building erected on the land should be equally distant from the street, with the front wall of the house then standing on the other lot, and as not intending to forbid the erection or to prescribe the shape or dimension of any porch, stoop, or platform which the respective owners might please to build.<sup>4</sup> It was stipulated in a deed that the front wall of any building erected on the land conveyed should be set back twenty feet from the avenue, with a proviso that "porticos and other usual projections" appurtenant to

<sup>1</sup> Bagnall v. Davies, 140 Mass. 76.

<sup>2</sup> Reardon v. Murphy, 163 Mass. 501. The court said it could see no ground for a distinction between a piazza covered by the main extension of a house and one covered by its own roof and attached to the house. See, also, Smith v. Bradley, 154 Mass. 227; Ogontz Land and Improvement Co. v. Johnson, 168 Pa. St. 178.

<sup>3</sup> Sanborn v. Rice, 129 Mass. 387; Attorney General v. Williams, 140 Mass. 329; 54 Am. Rep. 468; Payson v. Burnham, 141 Mass. 547.

<sup>4</sup> Graham v. Hite, 93 Ky. 474.

the wall might project into the reserved space, subject to these limitations: "No projection of any kind other than doorsteps and balustrades connected therewith, and also cornices at the roof of the building, will be allowed to extend more than five feet from said wall into said front space. No projection in the nature of a bay window, circular front, or octagon front, with the foundation wall sustaining the same (such foundation wall being a projection of the front wall) will be allowed, unless any horizontal section of such projection would fall within the external lines of a trapezoid, whose base upon the rear line of the aforesaid space does not exceed seven-tenths of the whole front of the building, nor exceed eighteen feet in any case, and whose side lines make an angle of forty-five degrees with the base; and each house in a block shall be considered a separate building within the meaning of this limitation." The court decided that the basement story of such a building surmounted by a balcony such as had never been used in this country was not a "usual projection" within the meaning of the deed, and also that each of several bay windows of the building must fall within the external lines of a trapezoid, the base of which, while it might overlap upon a portico or balcony, was clear of that of the adjoining bay window, and did not extend beyond the exterior lines of the building, and the combined bases of all the trapezoids must not exceed seven-tenths of the whole front of the building. A mandatory injunction was issued for the removal of such projections as were insisted upon, unless so slight as to come within the rule *de minimis*.<sup>1</sup>

§ 991. **Removal of restriction.**—Where a restriction is imposed for a certain purpose, and the object for which the restriction was made is afterward abandoned, the land may become free from the restriction. Thus, land

<sup>1</sup> Attorney General v. Algonquin Club, 153 Mass. 447. See, also, as to the construction of the decree, the later case of Attorney General v. Algonquin Club, 155 Mass. 128. See, also, Attorney General v. Ayer, 148 Mass. 584; Linzee v. Mixer, 101 Mass. 512.



lying between two streets in a city was divided up by the corporation owning it into lots, and sold at auction. Among the terms of the sale was the provision that "between the lots there shall be a railway fourteen feet wide, to be for the common benefit of all the lots bounding on it, to be used for no other purpose than a railway, and no building is ever to be built over it." By the deeds, afterward executed, the fee to the middle of this strip of land was conveyed, with the easements, and subject to the restrictions named in the terms of the sale. On this strip of land railway tracks were afterward laid, but subsequently its use for a railway ceased. An owner of one of the lots commenced a suit in equity, more than twenty years after the abandonment of the land for railway purposes, to compel the removal of a structure on the land of the defendant. The court held, however, that, as to the strip of land reserved for a railway, the defendant might use his land in any way he desired. It was no longer subject to the restriction that no building should be erected on it.<sup>1</sup> Where there is a covenant against the erection of tenement houses, it will not be enforced if flats and tenement houses have already been erected upon the larger portion of the adjacent lots. Such a change in the neighborhood defeats the object of the covenant, and it

<sup>1</sup> *Bangs v. Potter*, 135 Mass. 245. Said Coburn, J., in delivering the opinion of the court: "These servitudes and easements were expressly limited to a railway; and, though it would be a benefit to each lot to receive light and air through the space which was to be kept open for the railway, the benefits of light and air are incidents which result from the provisions for a railway, and are not provided for independently of the railway, and no servitude is imposed or easement granted for any purpose but the railway; and, when the railway was abandoned, all servitudes and easements terminated, and each owner had the right to use the whole of his lot for any purpose he pleased, without restraint by the 'terms of sale' or provisions in the deeds: *Central Wharf v. India Wharf*, 123 Mass. 567. What provision the corporation would have made for the use of this strip of land, if the possibility that the railway might be abandoned had been considered, it is useless to conjecture; it did not provide for such contingency, and the provisions of the deeds cannot be modified or extended, so as make them in accordance with what it may be supposed the corporation would have done if it had anticipated the existing state of things."

would be contrary to the principles of equity to deprive the owner of making a profitable use of his property. Compensation, however, will be given in damages.<sup>1</sup>

§ 991 a. **Reasonable construction.**—A restriction that a building shall be used only for particular purposes, or that it may be used for any purpose except those specified, must, like every other contract, receive a reasonable construction. It was contended in a case that we have already cited, where the use of a lower story of a dwelling-house as a grocery was prohibited, that such restrictions are viewed with disfavor, and are not to be extended by implication beyond their literal interpretation, and that the grantee had the right to convert his dwelling, when built, into a place of business, and might carry it on if he did so in an inoffensive manner. Mr. Justice Ames answered this contention by observing: "But this mode of dealing with the condition deprives it of all force whatever, and seems to us to be a mere evasion. There is nothing in the condition that appears to be unreasonable, or contrary to the policy of the law; and there is no reason for doing violence to the language in which it is expressed, or perverting its true meaning. Some kinds of industry might be carried on in a dwelling-house without any inconvenience whatever to the neighborhood. The house might be occupied by a physician or a lawyer, perhaps by a chemist or photographer, and a portion of it set apart as an office or place of business, without any offense or objection. All this would be allowable under the deed. But to change a dwelling-house into a grocery, a workshop, or a market, would be a very different matter. The condition cannot be construed as having any other meaning than to prescribe the kind of a building that shall be erected, and the manner in which it shall be used and occupied."<sup>2</sup> Where a deed provides that the grantor should not put upon the premises "any build-

<sup>1</sup> *Amerman v. Deane*, 132 N. Y. 355; 28 Am. St. Rep. 584.

<sup>2</sup> *Dorr v. Harrahan*, 101 Mass. 534; 3 Am. Rep. 398.

ings, timbers, trees, or other nuisances," the term "other nuisances" will not include excavations unless such an intention is apparent from the deed as a whole.<sup>1</sup>

§ 991 b. **Public policy.**—A restriction in a deed that the land conveyed shall be used for residence purposes only, and not for the purpose of carrying on any trading or mercantile business is not opposed to public policy.<sup>2</sup> An agreement in a lease that the premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose" is broken if the premises are allowed to be used as a boarding-house.<sup>3</sup> Where a statute authorizes the sale to a city of a square, and provides that "no part of said ground lying in the southward of the State-house within the wall as it is now built, be made use of for erecting any sort of buildings thereon, but that the same shall be and remain a public green and walk forever," the restriction is not violated by the erection of a monument consisting of a statue upon a pedestal.<sup>4</sup> A restriction in a deed that the lots conveyed shall not "be used for purposes other than a dwelling-house, office, privy, coach-house or stable, the restriction to cease only when the lot should be built on according to the spirit of the agreement," will prohibit the erection of a church.<sup>5</sup>

<sup>1</sup> *Cross v. Frost*, 64 Vt. 179. Said Mr. Justice Munson: "It is a general rule that when words of particular designation are followed by an expression of general import, the latter can be held to include only things similar in character to those specially named: *Brainerd v. Peck*, 34 Vt. 496; *Parks Administrator v. American Home etc. Soc.*, 62 Vt. 19; *Re Barre Water Co.*, 62 Vt. 27. If this rule governs the construction of the clause quoted, the phrase 'other nuisances' cannot be made to include a lowering of the surface, for the things named are only such as are placed upon and raised above the surface. We think the scope of the phrase must be restricted in accordance with this rule, unless its use in a more comprehensive sense is apparent from the instrument as a whole."

<sup>2</sup> *Morris v. Tuscaloosa Mfg. Co.*, 83 Ala. 565; 3 So. Rep. 689.

<sup>3</sup> *Gannett v. Albree*, 103 Mass. 372.

<sup>4</sup> *Society of Cincinnati's Appeal*, 154 Pa. St. 621; 26 Atl. Rep. 647.

<sup>5</sup> *St. Andrew's Church Appeal*, 67 Pa. St. 512. It was said by Mr. Justice Sharswood in delivering the opinion of the court: "It is not dis-

**§ 991 c. Changed conditions of city.** — Where a restriction is intended to make the locality suitable for a certain purpose, as for instance, for residences, and the growth of the city or other conditions not resulting from a breach of the covenant show that the purpose can no longer be accomplished, it would be inequitable to enforce

puted that the covenant upon which the injunction was prayed ran with the land, and was binding upon the defendants; nor has it been pretended that a court of equity is not bound according to well-established principles and precedents to enforce the specific performance of such a covenant, by restraining its breach, unless some good ground can be shown to the contrary. "It has been argued, but not much pressed, that the edifice proposed to be erected by the defendants, if against the letter, is not against the spirit of the covenant. It is urged that it was aimed at preventing what might be a nuisance or annoyance to the owners of other dwelling-houses on the square, and that a church in no sense would be such. It is enough to say, in answer to this suggestion, that by confining the erection of buildings to private dwelling-houses, offices, privies, or necessary houses, coach-houses, or stables, it was evidently intended to prohibit any buildings of public resort, such as a hotel, circus, menagerie, theater, or other similar establishment; and if the plaintiff cannot prevent a church from being built in the first instance, he certainly could not afterward prevent it from being used for any other purpose. The covenant is directed against the building alone, not the subsequent use, and when a building is lawfully erected on either of the lots, so far as that building is concerned, the covenant is at an end. There would be nowhere any power to restrain its application to any purpose not a nuisance in itself. To protect himself, therefore, from such a consequence, it was the clear right of the plaintiff to stand upon the covenant, even though the erection of a church might not prove of any actual inconvenience or annoyance to him so long as it was only used as a church. "It is plain, too, that in such a case the amount of damage which the plaintiff may be likely to suffer from the threatened breach, ought not to enter as an element in the determination. In this respect there is a manifest distinction between cases depending on nuisance and on contract: *Attorney General v. The Railway Companies*, Law Rep. 3 Ch. App. 99; *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218. Indeed, the fact that a jury would not give probably any more than nominal damages, is a circumstance which appeals most strongly to the conscience of the chancellor to stretch forth the strong arm of the court for the plaintiff's relief. It is his only adequate remedy for the violation of a clear and indubitable right." See, also, where the use of a building for charitable purposes has been held to be a violation of a restriction, *German v. Chapman*, 7 Ch. D. 271; *Rolls v. Miller*, 25 Oh. D. 206; 27 Ch. D. 71; *Bramwell v. Lacy*, 10 Oh. D. 691; *Winnepesaukee Camp Meeting Assn. v. Gordon*, 63 N. H. 505.

it, and hence its violation cannot be enjoined in equity.<sup>1</sup> Thus, where a covenant was made that only dwelling-houses should be erected on the land, and that no kind of manufactory, trade, or business should be conducted or suffered on the premises, but subsequently, the advance of business, and the operation of an elevated railroad through the street, caused the value of the property for any purpose except commercial to become greatly lessened, it was decided that owing to the changed conditions, the restriction would not be enforced against a subsequent purchaser.<sup>2</sup> In a similar case Mr. Justice Barker observed: "If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose

<sup>1</sup> *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365; *Jackson v. Stevenson*, 156 Mass. 496; 32 Am. St. Rep. 476; *Starkie v. Richmond*, 155 Mass. 188; *Duke of Belford v. British Museum*, 2 Mylne & K. 552; *Sayers v. Collyer*, 24 Ch. Div. 180; *German v. Chapman*, 7 Ch. Div. 271.

<sup>2</sup> *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365. Said Danforth, J., delivering the opinion of the court: "It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the legislature, and by reason of it there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected in various ways and degrees the uses of property in its neighborhood, and property values. It has made the defendant's property unsuitable for the use to which, by the covenant of his grantor, it was appropriated, and, if in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity. The land in question furnishes an ill site for dwelling-houses, and it cannot be supposed that the parties to the covenant would now select it for a residence, or expect others to prefer it for that purpose."

for which the restrictions were originally made.”<sup>1</sup> But the party may be entitled to some damages, and is entitled to have the bill retained for the purpose of assessing them.<sup>2</sup>

<sup>1</sup> In *Jackson v. Stevenson*, 156 Mass. 496; 32 Am. St. Rep. 476.

<sup>2</sup> *Jackson v. Stevenson*, 156 Mass. 496; 32 Am. St. Rep. 476.

## CHAPTER XXVIII.

### RECITALS.

- § 992. Kinds of recitals.
- § 993. Recital that grantee is a beneficiary.
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- § 1001. Illustrations.
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- § 1004. Presumption of satisfaction of vendor's lien.
- § 1005. Indefinite description.
- § 1006. Collateral circumstances.
- § 1007. Notice of trust in favor of grantee.
- § 1008. Bond for deed.
- § 1009. Recital of nominal consideration as evidence of fraud of trustee.

§ 992. **Kinds of recitals.**—Recitals are introduced for the purpose of explaining why the deed is executed, or of showing circumstances which preserve the connection in the chain of title, and are considered as being of two kinds, particular and general. Particular recitals are conclusive evidence of the facts recited in actions in which the purpose of the deed is directly involved.<sup>1</sup> But if the deed is merely collateral to the purposes of the action, the recitals are but *prima facie* evidence of the facts recited.<sup>2</sup> Where a married woman and her husband execute a deed of trust of her separate estate, a recital in such

<sup>1</sup> *Mix v. People*, 86 Ill. 329; *George v. Bischoff*, 68 Ill. 236; *Usina v. Wilder*, 58 Ga. 178; *Pinckard v. Milmine*, 76 Ill. 453.

<sup>2</sup> *Carpenter v. Duller*, 8 Mees. & W. 209.

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deed that it is made to secure her indebtedness, evidenced by her and his notes, does not preclude her in an action on the notes with a prayer for judgment against her separate estate, from showing that such notes were given for supplies furnished for a plantation cultivated in her husband's name and for his benefit.<sup>1</sup> But parties are not estopped from contradicting general recitals lacking the element of certainty.<sup>2</sup> A restriction upon the absolute title is not imposed by a recital in a grant from the State, that it is made for commercial purposes only.<sup>3</sup>

**§ 993. Recital that grantee is a beneficiary.**—Where a trustee executes a deed reciting that the grantee is one of the beneficiaries to whom the trustee was required to

<sup>1</sup> *Bank of America v. Banks*, 101 U. S. 240. See, also, *Young v. Raincock*, 7 Com. B. 310; *Southeastern Ry. Co. v. Wharton*, 6 Hurl. & N. 520; *Stroughill v. Buck*, 14 Q. B. 781; *Fraser v. Pendlebury*, 31 Law J. Com. P. 1; *Carter v. Carter*, 3 Kay & J. 617. In *Bank of America v. Banks*, 101 U. S. 247, Mr. Justice Clifford, in delivering the opinion of the court, said: "Facts recited in an instrument may be controverted by the other party in an action not founded on the same instrument, but wholly collateral to it. Recitals of the kind may be evidence for the party instituting the suit, but they are not conclusive: *Carpenter v. Buller*, 8 Mees. & W. 209, 213; *Herman on Estoppel*, § 238; *Lowell v. Daniels*, 2 Gray, 161, 169; 61 Am. Dec. 448; *Chaplain v. Valentine*, 19 Barb. 485, 488. In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract. Hence a married woman is not estopped by her covenants. Plainly the wife was not competent to purchase supplies for the plantation of her husband, and therefore cannot be estopped by these recitals: *Bigelow on Estoppel*, 276; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378."

<sup>2</sup> *Jackson v. Allen*, 120 Mass. 64; *Right v. Bucknell*, 2 Barn. & Adol. 278; *Lainson v. Tremere*, 1 Ad. & E. 792; *Kepp v. Wiggett*, 10 Com. B. 35; *Salter v. Kidley*, 1 Show. 59. Where the consideration is a sum in cash, and the balance, by the assuming on the part of the said grantees, the payment of a certain mortgage," existing upon the property as security for the grantor's note, this recital, in the absence of evidence of a contrary intention, shows an agreement on the grantee's part to pay the mortgage debt, and not simply to secure a discharge of the mortgage lien upon the land: *Lewis v. Covillaud*, 21 Cal. 178.

<sup>3</sup> *Abbott v. Curran*, 98 N. Y. 665. While a party claiming under a deed is estopped from denying any of the material recitals in it, this rule does not apply to those claiming adversely, or by title acquired prior to the execution of the deed: *Cobb v. Oldfield*, 151 Ill. 540; 42 Am. St. Rep. 263.

convey under the terms of the trust, such recital, in a suit in ejectment by the grantee against one who does not himself claim to be a beneficiary, is sufficient evidence of the facts recited. Thus, where the title to lands within the limits of a city is held by the city as a trustee for the parties in possession, to be conveyed to them upon compliance with certain conditions, a party who has no claim to the land cannot raise the question whether the grantee in a deed executed by the city authorities was a beneficiary, and as such entitled to a deed.<sup>1</sup>

**§ 994. Recital as surplusage.**—Recitals are to be construed as are other parts of the deed. In endeavoring to ascertain and effectuate the intention of the parties, courts may transpose clauses or strike them out altogether. In applying this familiar principle to recitals, we may select a case which we have had occasion to cite before as establishing the principle that a void deed is incapable of confirmation.<sup>2</sup> In this case a deed being void, a recital in a second deed that it was executed to confirm the former deed, the court declared, might be treated as surplusage. Consequently the second deed, with this rejection, if valid in other respects, would be sufficient to pass the title.<sup>3</sup>

**§ 995. History of title.**—A grantor who recites a history of his title in his deed is estopped from denying it against persons who have acted upon the faith of such representations. A grantor who recites in a deed of warranty that a certain tract of land had been conveyed to

<sup>1</sup> *McCreery v. Sawyer*, 52 Cal. 257; *McCreery v. Duane*, 52 Cal. 293. As to the effect of the recital in a will of deeds executed by the grantor in his lifetime, see *In re Heydenfeldt*, 106 Cal. 434. See, also, § 284 a, *ante*. See, also, *Soukup v. Union Ins. Co.*, 84 Iowa, 448; 35 Am. St. Rep. 317; 51 N. W. Rep. 167.

<sup>2</sup> See vol. 1, § 18.

<sup>3</sup> *Barr v. Schroeder*, 32 Cal. 609. Said Rhodes, J. (p. 618): "Strike out of the deed the matters in respect to the mistake, and the confirmation and the deed still remain sufficient in law to pass the title. Those matters must be disregarded because they were impossible of accomplishment in that mode. The deed is not vitiated by their presence."

him, is not permitted to deny this fact in a suit brought against him by his grantee, or a purchaser from the grantee.<sup>1</sup> But as between the original parties a recital unnecessary to the conveyance will not operate as an estoppel.<sup>2</sup> A person executing a deed in behalf of a manufacturing company, and reciting that he has authority by a vote of the company to execute such deed, is estopped to deny that he had such authority.<sup>3</sup>

§ 996. **Stranger to title.**—But a stranger cannot claim the benefit of recitals as estoppels against a party to the deed. An owner of land sold it in twenty-fourth parts, and some of the grantees subsequently joined with him in the execution of a mortgage to a stranger which contained a recital that the former owner was the owner of eleven twenty-fourths. After the execution of the mortgage, and before its registration, a creditor of such owner attached the land, and on execution bought the land. He then brought an action of ejectment against the persons in possession, the original owner's former tenants, and they alleged, in defense, that such original owner had no title when the attachment was served. The purchaser at the execution sale relied on the recital in the mortgage as an estoppel; but the court held that the recital could not operate as an estoppel in favor of the purchaser at execution sale and against the defendants.<sup>4</sup> Nor, if such

<sup>1</sup> Green v. Clark, 13 Vt. 158. See McCreery v. Duane, 52 Cal. 293.

<sup>2</sup> Osborn v. Endicott, 6 Cal. 149; 65 Am. Dec. 498.

<sup>3</sup> Stow v. Wise, 7 Conn. 214; 18 Am. Dec. 99. And see Douglass v. Scott, 5 Ohio, 195; Clark v. Baker, 14 Cal. 612, 629; 76 Am. Dec. 449; Van Rensselaer v. Kearney, 11 How. 322; Carver v. Jackson, 4 Peters, 1, 85; Penrose v. Griffin, 4 Binn. 231; Goodtitle v. Bailey, Cowp. 597; Bensley v. Burdon, 2 Sim. & St. 524; Marchant v. Errington, 8 Scott, 210; Adams v. Lansing, 17 Cal. 629. Recitals in a deed of an administrator of the steps required by law to make a sale are *prima facie* evidence of the facts recited: Worthy v. Johnson, 8 Ga. 236; 52 Am. Dec. 399; Doe v. Henderson, 4 Ga. 148; 48 Am. Dec. 216.

<sup>4</sup> Sunderlin v. Struthers, 47 Pa. St. 411. The court said that it was "an unprecedented extension of the doctrine of equitable estoppel, to hold that a man is bound to the world to make good what he has said to anyone, if others choose to rely upon it. If every man may be held liable, not only to parties and privies to his deed, but to all mankind, to

evidence be wanting, can the title be established by showing that the heirs at law of the person deceased received the consideration money.<sup>1</sup> Where a deed contains a recital that "the undersigned are owners and part owners of the within-described land," it is held that in the absence of words of limitation, the title of those who sign, although all do not sign, is conveyed.<sup>2</sup> In an action of ejectment, when a deed executed by one of the parties to the action, but to which the other party is an entire stranger, is introduced in evidence in the action, any recitals contained in it can be used only as simple admissions made by the party who executed the deed.<sup>3</sup> Where a deed executed by one tenant in common to a stranger refers to certain incidents of the joint estate, the other tenant is not estopped by the recital.<sup>4</sup> A recital in a deed that the grantors are the widow and heirs of a person who has a record title, is not competent evidence of the truth of the matters recited against a stranger.<sup>5</sup> If it be sought to establish title to real estate derived from one deceased, the executor's deed alone is not sufficient. The probate of the will and lawful proceedings ending in the execution of the deed must also be shown. The recitals in the executor's deed are not competent to establish their truth as against persons not in privity with the grantor.<sup>6</sup>

make good every introductory recital which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs. Such is not the law, and there are no authorities which assert it." See, also, *Allen v. Allen*, 45 Pa. St. 468, 473; *Robbins v. McMillan* 26 Miss. 434; *Whitaker v. Garnett*, 3 Bush, 402.

<sup>1</sup> *Miller v. Miller*, 63 Iowa, 387.

<sup>2</sup> *St. Louis v. Wiggins' Ferry Co.*, 15 Mo. App. 227. As to recitals in a deed made by a mortgagee under a power of sale, see *Tartt v. Clayton*, 109 Ill. 579.

<sup>3</sup> *Franklin v. Dorland*, 28 Cal. 175; 87 Am. Dec. 111. See as to recital of heirship, *Potter v. Washburn*, 13 Vt. 558; 37 Am. Dec. 615.

<sup>4</sup> *Thomason v. Dayton*, 40 Ohio St. 63. A deed reciting that the grantors are the heirs of a previous owner of the land, is not sufficient evidence as against a stranger of the death of the named ancestor, or that the grantors are in fact his heirs: *Kelley v. McBlain*, 42 Kan. 764.

<sup>5</sup> *Costello v. Burke*, 63 Iowa, 361.

<sup>6</sup> *Miller v. Miller*, 63 Iowa, 387.

§ 997. **Parties bound by recitals.**—Where it appears from the deed that all the parties intend to admit certain facts as true, a recital in the deed of such facts is an estoppel upon all. If the recital is intended, however, to be the statement of but one party, such party only is estopped, and what the intention is, is to be gathered from the deed.<sup>1</sup> If the language of the recitals indicates that the scrivener did not have the deed recited before him, and such recitals refer to what the grantors have done, or intend to do among themselves, in which acts the grantees have no part or interest, and there is nothing to show that the grantees had any knowledge of the recited deed except as recited, the recitals will be considered the statement of the grantors only.<sup>2</sup> An instrument which purported to be a will, recited that the testator had already distributed to his sons different tracts of land, and “which lands I have already divided amongst my sons as a donation *inter vivos*, to their entire satisfaction, and which donation by these presents I do hereby ratify.” The court held that the heirs of the person executing such instrument, and all persons claiming under them, were estopped by these recitals from asserting that a title did not pass, and that the intention of the instrument was to vest a title immediately, and not to make a testamentary disposition, and that by these recitals the sons took title by way of ratification of the previous gift.<sup>3</sup> But

<sup>1</sup> *Bower v. McCormick*, 23 Gratt. 310. See *Stroughill v. Buck*, 14 Q. B. 781; *Joeckel v. Easton*, 11 Mo. 118; 47 Am. Dec. 142; *Blackhall v. Gibson*, 2 Law Rec. 49; *Thompson v. Thompson*, 19 Me. 235; 36 Am. Dec. 751; *Young v. Raincock*, 7 Com. B. 310; *Simson v. Eckstein*, 22 Cal. 580.

<sup>2</sup> *Bower v. McCormick*, 23 Gratt. 310, and cases cited; *Borst v. Corey*, 16 Barb. 136. See *Osborne v. Endicott*, 6 Cal. 149; 65 Am. Dec. 498. An estoppel binds the grantor and his privies: *Rangely v. Spring*, 28 Me. 127; *Doe v. Howell*, 1 Houst. 178; *Simson v. Eckstein*, 22 Cal. 580; *Doe v. Porter*, 3 Ark. 18; 36 Am. Dec. 448; *Carver v. Jackson*, 4 Pet. 1; *Kinsman v. Loomis*, 11 Ohio, 475; *Byrne v. Morehouse*, 22 Ill. 603; *Pinckard v. Milmine*, 76 Ill. 453; *West v. Pine*, 4 Wash. 691; *Chautauqua County Bank v. Risley*, 4 Den. 480; *Jackson v. Parkhurst*, 9 Wend. 209; *Stoutimore v. Clark*, 70 Mo. 471; *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Usina v. Wilder*, 58 Ga. 178.

<sup>3</sup> *Adams v. Lansing*, 17 Cal. 629. The parties and their privies are

where a deed recites that "the above piece of land is covered by the North Branch Canal and embankment," this recital, while some evidence that the land belonged to the State, is not conclusive.<sup>1</sup> If a creek flows through the grantor's land, and a deed recites that the grantee is about to divert and appropriate its waters, and grants a right of way to conduct the water over the grantor's land, the grantor is not estopped from denying the right of the grantee to divert the water.<sup>2</sup> An estoppel must be certain, and in the case just cited there was no direct grant of any water or of the right of diversion. As the court said: "There is nothing in the recital that is inconsistent with the theory that the defendant had acquired the right which it now sets up; nor is there anything in it that is inconsistent with the theory that it had not acquired, but confidently expected to acquire it." In other words, an admission that a person has a right to divert water cannot be founded on a recital that he is about to divert it.<sup>3</sup>

**§ 998. Recognition of title in another.**—A person may be estopped from asserting title in himself by acts recognizing title in another. If a person procures an order of court for the sale of land on the assumption that the land is claimed by the county, and in the order of sale the land is described as land "formerly owned" by the person who procures the order, he is estopped from denying or revoking this recognition of title when a third person has acted upon it by a purchase of the land from the county, paid the purchase money, and erected improvements.<sup>4</sup> But a

bound by a recital in a mortgage that it is subject to a prior mortgage, and is given to secure certain notes: *Hasenritter v. Kirchhoffer*, 79 Mo. 239.

<sup>1</sup> *Pennsylvania & New York Canal Co. v. Billings*, 94 Pa. St. 40.

<sup>2</sup> *Zimmler v. San Luis Water Co.*, 57 Cal. 221.

<sup>3</sup> See *Zimmler v. San Luis Water Co.*, 57 Cal. 221. A recital in a conveyance of a municipal corporation of facts without the existence of which it would be unauthorized, is evidence of the facts recited, and no additional evidence is required in support of the deed: *Gordon v. City of San Diego*, 101 Cal. 522; 40 Am. St. Rep. 73.

<sup>4</sup> *Stevenson v. Saline County*, 65 Mo. 425.

grantor executing a deed confirming a former one to which he was not a party, does not adopt the recitals of the former deed so as to be estopped by them, unless language showing this intention is used.<sup>1</sup>

§ 999. **General recitals.**—In order that a recital may have the effect of an estoppel, it is essential that it be certain. Hence, as the element of certainty is lacking in general recitals, they do not, as a general proposition, estop the parties from denying the truth of the matters recited.<sup>2</sup> An estoppel does not result from statements which are immaterial to the objects of the deed. Thus, where a lot is excepted out of the land described in the deed, and the clause containing the exception states that such lot “remains vested” in the grantor, the grantee is not estopped from asserting title subsequently acquired to the excepted piece through a source hostile to the grantor’s title.<sup>3</sup> A recital that one of the grantors is a *feme covert* does not estop either party from showing that she was a *feme sole* at the time of the execution of the deed.<sup>4</sup>

§ 1000. **Notice from recitals.**—It is a familiar principle that every person taking a deed is charged with notice of all recitals contained in the instruments making his chain of title. “The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title which would be discovered by an examination of the deeds, or other muniments of title of his vendor, and of every fact as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is suffi-

<sup>1</sup> Doe dem. *Shelton v. Shelton*, 3 Ad. & E. 265. The parties may be estopped by recitals showing that the land conveyed was the grantor’s homestead: *Williams v. Swetland*, 10 Iowa, 51.

<sup>2</sup> Doe dem. *Butcher v. Musgrave*, 1 Man. & G. 615; *Right v. Buckner*, 2 Barn. & Adol. 278; *Naglee v. Ingersoll*, 7 Pa. St. 185; *Right v. Bucknell*, 2 Barn. & Adol. 278. And see *Farrar v. Cooper*, 34 Me. 394.

<sup>3</sup> *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Barb. 484.

<sup>4</sup> *Brinegar v. Chaffin*, 3 Dev. 108; 22 Am. Dec. 711.



cient contained in any deed or record, which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained."<sup>1</sup> Thus, where the deed under which a mortgagor holds refers to a prior unrecorded mortgage, a second mortgagee will take subject to the first.<sup>2</sup> The same principle applies where a person sells a tract of land, and does not take a

<sup>1</sup> *Cambridge Valley Bank v. Delano*, 48 N. Y. 329, 336; *Sergeant v. Ingersoll*, 15 Pa. St. 343; *Willis v. Gay*, 48 Tex. 463; 26 Am. Rep. 328; *Sitdham v. Matthews*, 29 Ark. 650; *Wood v. Krebbs*, 30 Gratt. 703; *Baker v. Mather*, 25 Mich. 51; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Sigourney v. Munn*, 7 Conn. 324; *Major v. Buckley*, 51 Mo. 227; *Rafferty v. Mallory*, 3 Biss. 362, 369; *Burrus v. Roulhac's Administrator*, 2 Bush, 39; *Corbitt v. Clenny*, 52 Ala. 480; *Phillips v. Porter*, 3 Ark. 18; 36 Am. Dec. 448; *Payne v. Abercrombie*, 10 Heisk. 161; *Deason v. Taylor*, 53 Miss. 697; *Blaisdell v. Stevens*, 16 Vt. 179; *White v. Foster*, 102 Mass. 375, 380; *Burwell's Executors v. Fauber*, 21 Gratt. 446; *Johnson v. Thweatt*, 18 Ala. 741; *French v. Loyal Company*, 5 Leigh, 627; *United States Mortgage Co. v. Gross*, 93 Ill. 483; *Foster v. Strong*, 5 Bradw. (Ill.) 223; *Wallace Gress v. Evans*, 1 Dak. Ty. 387; *Wiseman v. Hutchinson*, 20 Ind. 40; *Parke v. Neeley*, 90 Pa. St. 52. See, also, *Boggs v. Varner*, 6 Watts & S. 469; *Honore's Executor v. Blackwell*, 6 Mon. B. 67; 43 Am. Dec. 147; *Reeves v. Vinacke*, 1 McCrary, 213; *Moore v. Bennett*, 2 Ch. Cas. Ch. 246; *Greenfield v. Edwards*, 5 De Gex, J. & S. 582; *Robson v. Flight*, 4 De Gex, J. & S. 608; *Bacon v. Bacon*, Toth. 133; *Moore v. Bennett*, 2 Ch. Cas. Ch. 246; *Æna Life Ins. Co. v. Ford*, 89 Ill. 252; *McConnell v. Reed*, 4 Scam. 202; *Frye v. Partridge*, 82 Ill. 267, 270; *Rupert v. Mark*, 15 Ill. 540; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Chicago etc. R. R. v. Kennedy*, 70 Ill. 350, 362; *Merrick v. Wallace*, 19 Ill. 486; *Morris v. Hogle*, 37 Ill. 150; 87 Am. Dec. 243; *Croskey v. Chapman*, 26 Ind. 333; *Allen v. Poole*, 54 Miss. 323; *Johnston v. Gwathmey*, 4 Litt. 317; 14 Am. Dec. 135; *Dudley v. Witter*, 46 Ala. 664; *Green v. Early*, 39 Md. 223; *Ridgeway v. Holliday*, 59 Mo. 444; *Frost v. Beekman*, 1 Johns. Ch. 288; *Campbell v. Roach*, 45 Ala. 667; *Burch v. Carter*, 44 Ala. 115; *Case v. Erwin*, 18 Mich. 434; *Baker v. Mather*, 25 Mich. 51; *Brush v. Ware*, 15 Peters, 93; *Olements v. Wells*, Law R. 1 Eq. 200; *Pilcher v. Rawlins*, Law R. 11 Eq. 53; *Davies v. Thomas*, 2 Younge & C. 234; *Murrell v. Watson*, 1 Tenn. Ch. 342; *Acer v. Westcott*, 1 Lans. 193; *Christmas v. Mitchell*, 3 Ired. Eq. 535; *Malpas v. Ackland*, 3 Russ. 273; *Casey v. Inloes*, 1 Gill, 430; 39 Am. Dec. 658; *Kerr v. Kitchen*, 17 Pa. St. 433; *Long v. Weller's Executors*, 29 Gratt. 347, 353; *Pruden v. Alden*, 23 Pick. 184; 34 Am. Dec. 51; *Fitzhugh v. Barnard*, 12 Mich. 105; *Dean v. Long*, 122 Ill. 447; 14 N. E. Rep. 34; *Smith v. Lowry*, 113 Ind. 37; 15 N. E. Rep. 17; *Wait v. Baldwin*, 60 Mich. 622; 1 Am. St. Rep. 551; 27 N. W. Rep. 697; *Whitlock v. Johnson*, 87 Va. 323; 12 S. E. Rep. 614.

<sup>2</sup> *Buchanan v. Balkum*, 60 N. H. 406; *Fifield v. Elmer*, 25 Mich. 51.

mortgage for the purchase money, but recites in his deed the terms of the sale, and describes the notes which he has taken for the unpaid purchase money. A purchaser before the maturity of the notes has notice of the vendor's lien, by reason of the recitals in the deed.<sup>1</sup> An owner of land executed a mortgage, and three years after its execution the mortgage was foreclosed, and the premises conveyed to the mortgagee. The deed to the mortgage was not, however, recorded in the proper county. Some time afterward, the original mortgagee to whom the deed was made, as stated, transferred the land by deed, which was properly recorded. Twenty-four years after the execution of the mortgage, the mortgagor made a deed of the same property subject to the mortgage, and described it as given in "1830 or 1831." It was held, very properly, that the grantee had notice of the mortgage, and of the fact that it was unpaid, and he had every reason to believe after the lapse of the long period of twenty-four years, that it had been foreclosed. Consequently the grantee took subject to the mortgage, and to all the rights which had accrued under it.<sup>2</sup> So where there are two joint owners of land, a purchaser from one is chargeable with notice of the interest of the other, when it appears by the deed to which he must look for his vendor's title.<sup>3</sup>

§ 1001. **Illustrations.**—A person conveyed a piece of land to a trustee in trust to secure the payment of, *first*, a debt due to one creditor, and *secondly*, a debt due to an-

<sup>1</sup> *Croskey v. Chapman*, 26 Ind. 333. So the recital of a consideration may show that a land company has sold land in violation of its charter: *Franco Land Co. v. McCormick*, 85 Tex. 416; 34 Am. St. Rep. 815. See § 710, *ante*.

<sup>2</sup> *Fitzhugh v. Barnard*, 12 Mich. 104.

<sup>3</sup> *Campbell v. Roach*, 45 Ala. 667. A recital, to convey notice, must be in the chain of title: *Hazlett v. Sinclair*, 76 Ind. 488; 40 Am. Rep. 254; *Mason v. Black*, 87 Mo. 329; *Knox Co. v. Brown*, 103 Mo. 223; 15 S. W. Rep. 382; *Boggs v. Varner*, 6 W. & S. 469; *Coleman v. Barklew*, 27 N. J. L. 357; *Polk v. Cosgrove*, 4 Biss. 437; *Mueller v. Engeln*, 12 Bush, 441; *Burke v. Beveridge*, 15 Minn. 205; *Digman v. McCollum*, 47 Mo. 372; *Tydings v. Pitcher*, 82 Mo. 379; *Corbin v. Sullivan*, 47 Ind. 356; 40 Am. Rep. 254; *Bellas v. Lloyd*, 2 Watts, 401.

other creditor. The latter required the trustee to sell the land, and the owner began a suit to enjoin the sale, making the trustee and such second creditor parties, and with his bill filed the deed as an exhibit. In the decree, the trustee was appointed a special commissioner to sell the land, and when the land was sold such second creditor became the purchaser. The sale was confirmed and approved, and the court directed the trustee to convey the land to such second purchaser, and to take a deed of trust upon it to secure the purchase money. In accordance with this direction the trustee conveyed the land to such second creditor, and in his conveyance referred to it as the land mentioned in the bill. When the trustee came to take the deed of trust, as directed, instead of taking it upon this land, he took it upon another tract of such second creditor which was encumbered with other liens. Some eight years afterward such second creditor conveyed the land by deed, the deed referring to it as the land purchased under the decree. Subsequently the assignee of the first creditor filed a bill against the last purchaser to enforce the lien of the original deed of trust. The purchaser claimed that he was a *bona fide* purchaser without notice. At the time when he purchased, war was being carried on in the State, and he alleged that as he lived some distance from the courthouse, which, by reason of the war, was difficult of access, he refused to purchase unless his grantor, the second creditor, would bring a certificate of the clerk of the court that the land was free from all liens and encumbrances; and that the clerk, after an examination of the records of his office, gave a certificate, that, so far as shown by the records of his office, no lien or encumbrance existed on this land; and that on this assurance he purchased the land, paid the purchase money, and received his deed. On this somewhat complicated state of facts, the court held that the purchaser was bound to know all the matters disclosed by the suit, and that his claim to the defense of a *bona fide* purchaser could not be supported by

the certificate of the clerk.<sup>1</sup> A sold land to B, executing a bond for a title, and the latter, before the full payment of the purchase money, sold the land to C, also executing a bond for title, and directing that upon the payment of the balance still due to A, that the latter should make a deed to C, retaining a lien for the amount to be paid to B by C, which bond was registered. C paid to A the balance due to him, and A and C thereupon executed a deed to D. The deed to D referred to the registered bond for title, but failed to retain a lien. Subsequently E, who had no actual notice of any vendor's lien, but who had knowledge of the bond referred to in the deed, bought the land for full value from one who derived title under D. It was held that E was put upon inquiry by reference in the deed to the bond for title, and hence was charged with constructive notice of its contents.<sup>2</sup> A city conveyed to trustees, by an unrecorded deed, land for a cemetery. Afterward, when the use of the cemetery had been discontinued, and some of the bodies had been removed, and others were not disturbed, the city, for a valuable consideration, executed a quitclaim deed to a person, referring to the premises as a tract formerly dedicated for a public cemetery, and such deed and the ordinance under which it was made were subsequently confirmed by legislature. An action was brought to recover the land from the trustees, and the court held that the quitclaim deed by its recitals imparted notice of the dedication of the land by the unrecorded deed, and that by the latter

<sup>1</sup> Wood v. Krebbs, 30 Gratt. 708. In Burwell's Executors v. Fauber, 21 Gratt. 446, the court say: "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best-settled maxims of the law, and applies exclusively to a purchaser. He must take care and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual*, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice."

<sup>2</sup> Payne v. Abercrombie, 10 Heisk. 161.

deed the legal title passed to the trustees and the trust was still in force, and hence a recovery of the land could not be decreed.<sup>1</sup> Though the instrument is not recorded, and a party may have no actual notice of it, yet if he must trace his title through it, he is bound by whatever is contained in it.<sup>2</sup> A mortgage was executed in Iowa by an owner of a tract of land to secure the payment of several promissory notes, which were described in the mortgage. When the mortgage was spread upon the records, the description of one note was omitted. Subsequently the mortgagor sold the premises and conveyed the same by a deed, in which reference was made to the mortgage, and in the mortgage the aggregate amount of the several notes was correctly stated. The grantee, it was held, took the land by force of such recital in his deed, with notice of the mortgage as security for all the notes.<sup>3</sup>

§ 1002. **Failure to read recitals.**—Every person is presumed to read the deed under which he holds, and a failure to read certain recitals contained in the deed cannot avail him as a defense when it is sought to charge him with notice. A person claimed title under a deed which stated that it was made subject to “two mortgages for two thousand dollars,” and contained also a warranty against all claims “except said mortgages.” On the land embraced in the deed there were two prior mortgages. One of these, amounting to fifteen hundred dollars, was recorded, and the grantee had actual knowledge of it. Of the other he had no notice except such as was given by his deed. As a matter of fact, the grantee did not read his deed, and did not actually know of the clauses referring to the mortgages. It was held that he must be presumed to know the contents of his deed, and that it was sufficient to put him upon inquiry, and to affect him with notice of the mortgage which was not recorded.<sup>4</sup>

<sup>1</sup> Weisenberg v. Truman, 58 Cal. 63.

<sup>2</sup> Stees v. Kranz, 32 Minn. 313.

<sup>3</sup> Dargin v. Beeker, 10 Iowa, 571.

<sup>4</sup> Hamilton v. Nutt, 34 Conn. 501.

“Men of ordinary prudence,” said Carpenter, J., “will use all reasonable means to ascertain the state and condition of their own titles. Hence, we may lay it down as a rule, founded upon the experience of mankind, that one who has knowledge of the existence of a deed, to which he has access, and which affects the title to property in which he is interested, will, in equity, be presumed to have knowledge of the contents of the deed. And, generally, when a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. Under our recording system a deed duly recorded is constructive notice to all the world; and the law conclusively presumes that every person interested has knowledge not only of the deed, but of its precise language, where that is material. These principles apply in full force to this case. If a man will, under certain circumstances, be presumed to have knowledge of the contents of the deed of another, how much more reasonable is it to presume that he has knowledge of the contents of his own deed. Occasional hardships may result from the application of this rule; but it is believed to be founded in sound policy, and that in a large majority of cases it will tend to prevent fraud and promote the cause of justice.”<sup>1</sup> “It is in consonance with reason, that if the title deeds under which a purchaser derives title recite an encumbrance, he will be bound by that recital, and presumed to have had notice of it, whether he has read it or not. For the law will not permit him to deny notice by insisting that he has not read the deed.”<sup>2</sup>

**§ 1003. Recitals in patents.**—The same rule as to recitals in deeds applies also to recitals in patents from the government. A person who traces his title to a patent is charged with notice of the facts contained in its recitals.<sup>3</sup>

<sup>1</sup> *Hamilton v. Nutt*, 34 Conn. 501.

<sup>2</sup> *Wailes v. Cooper*, 24 Miss. 208, 228, per Mr. Justice Yerger.

<sup>3</sup> *Bonner v. Ware*, 10 Ohio, 465. See, also, *Brush v. Ware*, 15 Peters, 93; *Bell v. Duncan*, 11 Ohio, 192; *Ware v. Brush*, 1 McLean, 533; *Reeder v. Barr*, 4 Ohio, 446; 22 Am. Dec. 762; *Polk's Lessee v. Wendall*, 5

If a patent issues to one as assignee of another, as executor of a third person, deceased, a purchaser from the patentee must determine at his peril whether the executor had the requisite power to make an assignment of the warrant.<sup>1</sup>

**§ 1004. Presumption of satisfaction of vendor's lien.** A deed recited that it was made "in consideration of the sum of nine hundred and thirty-seven and a half dollars, to me in hand paid, or secured to be paid, the receipt whereof is hereby acknowledged." This recital was held to be sufficient notice to subsequent purchasers that a vendor's lien existed, and it was incumbent upon such subsequent purchasers to show that the vendor's lien for any unpaid balance had been removed, waived, or abandoned.<sup>2</sup> And when it is recited in a deed that the sale is made on credit, it is the duty of the grantee to inquire whether the purchase money has been paid. He is not authorized to presume its payment from the fact that the time for the payment of the purchase money, as mentioned in the deed, has elapsed.<sup>3</sup> The grantee, if he had made the inquiry, must have learned the truth, and, by failing to make it, he is guilty of such negligence as precludes him from claiming to occupy the position of an innocent purchaser without notice.<sup>4</sup> But when sufficient time has elapsed to bar an action on the notes taken for the purchase money, a purchaser or judgment creditor, although the notes may have been renewed, may rely, it is held, upon the presumption that they have been paid.<sup>5</sup> "When the purchaser appears upon the

Wheat. 293; *Miller v. Kerr*, 7 Wheat. 1; *Hoofnagle v. Anderson*, 7 Wheat. 212.

<sup>1</sup> *Bonner v. Ware*, 10 Ohio, 465. As to recitals in Mexican grants, see *Ferris v. Coover*, 10 Cal. 589; *Nieto v. Carpenter*, 7 Cal. 527; *Scott v. Ward*, 13 Cal. 458.

<sup>2</sup> *Thornton v. Knox*, 6 Mon. B. 74. See, also, *Johnston v. Gwathmey*, 4 Litt. 317; 14 Am. Dec. 135.

<sup>3</sup> *Deason v. Taylor*, 53 Miss. 697.

<sup>4</sup> *Honore's Executor v. Bakewell*, 6 Mon. B. 67; 43 Am. Dec. 147.

<sup>5</sup> *Avent v. McCorkle*, 45 Miss. 221.



face of his deed on the public records of the county as the absolute owner, without reservation or encumbrance, in favor of the vendor, how long will a court of conscience recognize his lien as against creditors who have recovered judgments against the vendee? Can the vendor, by protracted indulgence, keep alive his secret privilege after a presumption may fairly arise that the debt has been paid? Credit, in a very large measure, depends upon the amount and value of property which a man ostensibly owns. If one is in the possession of land under a deed made ten or twelve years ago, would the community be justified in inferring that the purchase money had been paid, and might not prudent men give credit on the faith of the fact? If the vendor lie by all that time, taking no measures to enforce his claim, should he not be considered as holding his purchaser out to the community as an unencumbered owner; and when creditors under subsequent judgments proceed against the land, ought he not to be postponed to them? The vendor's privilege results by law from the sale, and is an incident of the debt. When the debt is barred the lien is extinguished. If a court of equity would keep up this lien (as against intervening claimants) long enough to afford the vendor a full, reasonable time to get in his money, as long as a right of action at law is preserved to him to recover the debt, it would seem that ample protection is given to his equity. It would be unreasonable and fruitful of evil to leave it in the discretion of the vendor to indulge and postpone, whether by renewals or not, so that others may be entrapped to deal with the vendee as a man of substance, and then turn upon them and say that they did so at their risk, and sweep from them that upon which they trusted."<sup>1</sup>

<sup>1</sup> Simrall, J., in *Avent v. McCorkle*, 45 Miss. 221. In *Judson v. Dada*, 79 N. Y. 373, the facts were these: An owner of land subject to a mortgage which was recorded conveyed a portion thereof to two persons. The deed stated the property was "supposed to be eighty acres." The grantor covenanted that in case of a deficiency she would pay therefor at the rate of thirty dollars per acre. The grantees assumed and agreed to

§ 1005. **Indefinite description.**—It is not essential in all cases that the recital should be so certain in its terms as to apprise the purchaser of all the rights of another. It will charge him with notice if it is sufficient to put him upon inquiry. A testator devised to his son Robert, “fifty acres on the west end of the place previously given to his son Michael, for ten years, and at the end of that time to hold the same by paying to Michael five dollars per acre in installments, to be given him on either side of the road, as Michael may think proper.” A certain portion of the premises was set off at the west end of the tract devised, though a clearing had first been commenced at the east end by an agreement between the two sons, and had been paid for, but no deed had been executed, nor was there any continued possession on the part of Robert. An heir of Robert brought an action of eject-

pay the whole mortgage in consideration for the deed. It having been ascertained subsequently that there was a deficiency in the land conveyed, the grantor executed to the grantees a writing, agreeing that she would save them harmless to the amount of \$273.32 from any claim under the mortgage. This latter sum was what the deficiency would be. The grantor afterward conveyed the remaining portion of the property to other persons, and covenanted that the same was free and clear from all encumbrances. An action was brought to foreclose the mortgage, and the court held that the grantees of the residue were entitled to no greater equities than those which the grantor had at the time she conveyed, and intimated, though it did not so decide, that sufficient was contained in the first deed to put the subsequent grantees upon inquiry, and charge them with constructive notice of the release by the grantor to the first grantees to the extent of the value of the deficit, in case a notice was required. See, also, *Howard Ins. Co. v. Halsey*, 8 N. Y. (4 Seld.) 271; 59 Am. Dec. 478; *Green v. Slayter*, 4 Johns. Oh. 38; *Hope v. Liddell*, 21 Beav. 183; *Canbridge Bank v. Delano*, 48 N. Y. 328; *Howard v. Chase*, 104 Mass. 249; *Hudson v. Warner*, 2 Har. & G. 415; *Garrett v. Puckett*, 15 Ind. 485; *Ross v. Worthington*, 11 Minn. 438; 88 Am. Dec. 95; *Taylor v. Stibbert*, 2 Ves. 437; *Martin v. Cotter*, 3 Jones & L. 496, 506; *Clements v. Welles*, Law R. 1 Eq. 200; *Hall v. Smith*, 14 Ves. 426; *Cosser v. Collinge*, 3 Mylne & K. 282; *Lewis v. Bond*, 18 Beav. 85; *Cox v. Coventon*, 31 Beav. 378; *Wilbraham v. Levesey*, 18 Beav. 208; *Tanner v. Florence*, 1 Oh. Cas. Ch. 259; *Walter v. Maunde*, 1 Jacob & W. 181; *Drysdale v. Mace*, 2 Smale & G. 225; *Pope v. Garland*, 4 Younge & C. 394; *Smith v. Capron*, 7 Hare, 185; *Babcock v. Lisk*, 57 Ill. 325; *Martin v. Nash*, 31 Miss. 324; *Sanborn v. Robinson*, 54 N. H. 239; *Brown v. Simons*, 44 N. H. 475; *Briggs v. Palmer*, 20 Barb. 392; 20 N. Y. 15.

ment against a purchaser at a sheriff's sale under Michael, who claimed to hold as a purchaser without notice. But the court held that the will was notice to him of a devise of fifty acres off the northwest corner of the tract, which part, unless it had been selected elsewhere, was the part best answering the description in the will. A person who read the will would be under obligation to inquire if the devisee had obtained his fifty acres, and at what time.<sup>1</sup>

§ 1006. **Collateral circumstances.**—While a grantee is bound to take notice of everything that appears on the face of the deeds in his chain of title, he is not compelled to prosecute an inquiry into collateral circumstances. And where a deed refers to another, he is not required to take notice of a fact exhibited in the latter deed which is completely foreign to the subject of the reference.<sup>2</sup> He is not obliged, for instance, to take notice that the deed to which reference is thus made has incorporated into it a bill of sale of personal property on which the grantor attempts to retain a lien.<sup>3</sup> A purchaser is affected with notice by a recital so far as it concerns the title to the land purchased. He is not affected with notice with respect to the title of any other land than that which is transferred by such deed.<sup>4</sup>

<sup>1</sup> McAteer v. McMullen, 2 Pa. St. 32.

<sup>2</sup> Mueller v. Engeln, 12 Bush, 441; Burch v. Carter, 44 Ala. 115.

<sup>3</sup> Mueller v. Engeln, 12 Bush, 441.

<sup>4</sup> Boggs v. Varner, 6 Watts & S. 469. In this case (at page 474), it is said on the question of whether notice should be proven by vague and uncertain evidence, by Rogers, J: "A court of equity acts on the conscience, and as it is impossible to make any demand on the conscience of a man who has purchased for a valuable consideration, *bona fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favor of a court of equity. As every presumption is in favor of the subsequent purchaser, when the former owner is guilty of neglect, his title cannot be postponed except by evidence which taints his conduct with fraud. And this, it is obvious, ought not to be done by testimony in its nature vague and indefinite, and leading to no certain results, such as that he ought to have known of the prior title because he lived near the owner, in the same town, perhaps, or on the next lot, that he was well acquainted with him, or because the title was well known to others. This may all be true, and yet at the time he pays his

**§ 1007. Notice of trust in favor of grantee.**—Where a deed is made for a nominal consideration, and contains a recital that it is made in pursuance and fulfillment of a trust reposed in the grantor by the grantee, the recital is not notice of a trust in favor of any other person than the grantee himself. This is said to be especially true when the deed is made to the grantee and his heirs in fee simple, for the only proper use and behoof of the said grantee and his heirs and assigns forever.<sup>1</sup>

**§ 1008. Bond for deed.**—A purchaser, being presumed to know every fact to which he is led by a deed forming a link in the chain of his title, cannot in equity, escape from the effect of such presumption, because an equitable right, and not a legal one, is the fact to which he is referred. A took a mortgage from B, on premises to which B had title under a deed from C, which contained this recital: "This conveyance is made in pursuance of a contract of sale of said premises, made and entered into by the party of the first part for a conveyance thereof to one D, of whom the said party of the second part has become the assignee or purchaser, and as such entitled to a fulfillment thereof, by virtue of this conveyance," the contract being identified by its date. The court held that A took his mortgage with notice of the equitable right of D to a conveyance from C, and of the terms of the agreement between D and B, upon which the right of B to a deed from C was founded.<sup>2</sup> And a bond for title, held by the vendee, is sufficient to charge a purchaser from him with notice of the lien of the vendor for the unpaid purchase money.<sup>3</sup>

money, he may be ignorant of any other title than his own. It is not just that inferences should be strained in favor of the person by whose default the mischief has been done."

<sup>1</sup> *Kaine v. Denniston*, 22 Pa. St. 202.

<sup>2</sup> *Acer v. Westcott*, 1 Lans. 193.

<sup>3</sup> *Newsome v. Collins*, 43 Ala. 663; *Bradford v. Harper*, 25 Ala. 337. And see *Sergeant v. Reynolds*, 15 Pa. St. 343; *Witter v. Dudley*, 42 Ala. 616; *Campbell v. Roach*, 45 Ala. 667; *Johnson v. Thweatt*, 18 Ala. 741; *Coy v. Coy*, 15 Minn. 119. "The question of the sufficiency of notice is

§ 1009. **Recital of nominal consideration as evidence of fraud of trustee.**—As a general proposition, when the trust is defined as to its object, but it is provided that the property may be sold, and the proceeds reinvested upon trusts that require a certain time to be made, and call for the exercise of discretion on the part of the trustee, the purchaser is not bound to see to the application of the purchase money. By a deed properly recorded land was conveyed to a person in trust. The deed of trust gave the trustee power to sell the property, and to reinvest the proceeds, if the sale were for the benefit of the *cestui que trust*. The trustee executed a deed conveying the land, in consideration of one dollar and other valuable considerations. The grantee under this deed mortgaged the land and reconveyed it to the trustee, subject to the mortgage. After the registration of these deeds, the mortgagee assigned the mortgage. The recital in the deed from the trustee was held not to be sufficient notice to the assignee that the acts of the trustee were not in accordance with the power conferred upon him. There was no obligation upon the assignee to see whether the trustee had reinvested the money obtained from the sale.<sup>1</sup> “The assignee of the mortgage,” said Colt, J., “was not bound to ascertain at her peril, whether it was in fact a sale upon which the trustee actually received the money; and her title cannot be defeated, unless she had actual or constructive notice of the alleged fraud. It is contended that the recital in the deed, that it was given in consideration of one dollar and of other valuable considerations, is either actual or constructive notice that the trustee received no money for the deed, and that it was given in violation of the trust. But this recital cannot be regarded as actual or positive notice of the fact charged, because, assuming that a subsequent purchaser

often embarrassing, and sometimes difficult of solution. But, as a general rule, to charge a purchaser, the notice must be such as explains itself by its own terms, or refers to some deed or circumstance which explains it, or leads to its explanation”: *White v. Carpenter*, 2 Paige, 217, 249.

<sup>1</sup> *Norman v. Towne*, 130 Mass. 52.

is to be affected by it under our registry law, still, the language does not necessarily import misconduct in the trustee, or that there was an absence of consideration. It is entirely consistent with the fact that the consideration was received in securities taken by the trustee as a valid change of investment, and in fulfillment of the trust. And although the fact that the actual consideration is not stated in the usual form may be competent, in connection with other evidence, to show that the purchaser was, by all the circumstances, put upon inquiry, and therefore is chargeable with constructive notice, yet the recital alone is plainly not enough to raise in law a conclusive presumption of notice.”<sup>1</sup> Somewhat similar in principle is the case where A borrowed three hundred dollars of B, and transferred and delivered to him a note and mortgage for fifteen hundred dollars as collateral security for the loan, the assignment of the mortgage being absolute in form and reciting a consideration of three hundred dollars, the amount borrowed. Before the maturity of the note, B transferred it and assigned the mortgage to C, as collateral security for a loan of twelve hundred dollars. A brought a suit in equity against B and C to redeem the note and mortgage. The court held that the recital of the consideration in the assignment of the mortgage to B was not of itself sufficient to put C on inquiry, or to show that he acted fraudulently, and A could exercise the right of redemption only by paying the amount for which C held the note and mortgage as collateral security.<sup>2</sup> The notice, in

<sup>1</sup> *Norman v. Towne*, 130 Mass. 52.

<sup>2</sup> *Briggs v. Rice*, 130 Mass. 50. The court, per Colt, J., said: “It is not easy to state by rule what constitutes in equity implied or constructive notice, because it depends in most cases upon a great variety of circumstances, having a tendency to excite suspicion, or showing fraudulent purpose. The general rule is, that whatever puts a party upon inquiry amounts to notice, provided the inquiry, as in the case of a purchaser, is a duty, and would lead to a knowledge of the fact. It is left to be decided in each case what is sufficient to put a party on inquiry. In the present case, the fact relied on is clearly not sufficient. The defendant became holder of this note for a valuable consideration before its maturity. He had no actual notice of any equities which would defeat his right to recover an amount sufficient to secure the payment of the debt

other words, derived from matters of record, is never construed as being more extensive than the facts stated by the record.<sup>1</sup>

for which it was pledged. As owner of the mortgage note, he was, in fact, entitled in equity, without any assignment, to claim the benefit of the mortgage security. The mortgage in this case, however, was assigned to him by one who had a perfect record title. It is well settled that the consideration expressed in a deed is not conclusive, and it is always open to show what the real consideration was, and that it was more or less than the amount named: *Bullard v. Briggs*, 7 Pick. 533; 19 Am. Dec. 292. The recital of an inadequate consideration in the assignment under which Rice, the assignor of Gooding, claimed, if brought to the knowledge of the latter, might be competent as one circumstance in connection with other evidence to charge him with gross negligence or a fraudulent purpose, but is not alone sufficient to put him on inquiry, or prove fraud on his part. It is not easy to see in it anything calculated even to arouse suspicion. It is consistent with the fact that the amount of three hundred dollars was agreed on by the parties as the fair value of the mortgaged property, or that it was fairly bought for that sum by Rice. It does not necessarily imply any defect or qualification of the apparent title in him. It certainly cannot be treated as actual notice that the note was subject to some unknown equity, the nature of which it was the duty of the defendant to ascertain at his peril. As a prudent man, taking a note not yet due, it was sufficient for him to know that the assignment transferred to him a good title to the mortgage security. It is not enough that an overprudent and cautious person, if his attention had been called to the circumstance in question, would have been likely to seek an explanation of it. There must be some clear neglect to inquire, after actual notice that the title is in some way defective, or some fraudulent and willful blindness, as distinguished from mere want of caution: *Jones v. Smith*, 1 Hare, 43, 55, and 1 Phillips, 244; *Ware v. Lord Egmont*, 4 De Gex, M. & G. 460; *Dexter v. Harris*, 2 Mason, 531; *Buttrick v. Holden*, 13 Met. 355; *Jackson v. Valkenburgh*, 8 Cowen, 260."

<sup>1</sup> *Gale's Executor v. Morris*, 29 N. J. Eq. 222.



## CHAPTER XXIX.

### DESCRIPTION.

- § 1010. Certainty of description.
- § 1011. Illustrations of uncertainty.
- § 1012. What is a sufficient description.
- § 1013. Illustrations.
- § 1014. Land of reputed owner as boundary.
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- § 1044. Quantity of land enumerated.
- § 1045. Intention that quantity shall control.
- § 1046. Words "more or less."

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§ 1010. **Certainty of description.**—The description of the premises conveyed must be sufficiently definite and certain to enable the land to be identified; otherwise it will be void for uncertainty.<sup>1</sup> A suit in ejectment was commenced to recover, "the northwest fourth of the southwest quarter of section eleven, township fifty-three, range sixteen," embracing forty acres. The deed conveyed several tracts, but the only designation in the deed which would include the forty-acre tract for which suit was brought was, "the southwest quarter of section eleven, containing forty acres." As a quarter section contains four forty-acre tracts, it was impossible to decide to which forty-acre tract the description applied. This ambiguity in the description was held to be patent, and hence incapable of removal by extrinsic evidence. A suit in ejectment founded on such a deed must fail. The title should be first perfected by an action brought for the reformation of the deed.<sup>2</sup> But to render the deed void for uncertainty in the description, the ambiguity must be patent and appear on the face of the instru-

<sup>1</sup> *People v. Klumpke*, 41 Cal. 263; *Wofford v. McKinna*, 23 Tex. 36, 44; 76 Am. Dec. 53; *Williams v. Western Union R. R. Co.*, 50 Wis. 71; *Campbell v. Johnson*, 44 Mo. 247; *Boardman v. Read*, 6 Peters, 328; *Bailey v. White*, 41 N. H. 337. See *Gatewood v. House*, 65 Mo. 663; *United States v. King*, 3 How. 773; *Sneed v. Woodward*, 30 Cal. 490; *Montag v. Linn*, 23 Ill. 551; *Kea v. Robeson*, 5 Ired. Eq. 375; *Lumbard v. Aldrich*, 8 N. H. 31; 28 Am. Dec. 381. See, also, *Cummings v. Browne*, 61 Iowa, 385; *Shoemaker v. McMonigle*, 86 Ind. 421; *Brown v. Chambers*, 63 Tex. 131; *Freed v. Brown*, 41 Ark. 495; *Howard v. North*, 5 Tex. 290; 51 Am. Dec. 769; *Cunningham v. Thornton*, 28 Ill. App. 58.

<sup>2</sup> *Campbell v. Johnson*, 44 Mo. 247.

ment.<sup>1</sup> A deed is void for uncertainty which describes the land conveyed as "one tract of land lying and being in the county aforesaid, adjoining the lands of John J. Phelps and Norfleet Pender, containing twenty acres more or less."<sup>2</sup> A deed is void for uncertainty, if from its face it is apparent that there are two lots to which the description is equally applicable.<sup>3</sup> Such an ambiguity cannot be explained by parol evidence.<sup>4</sup> So a grant from the State is void in which the description is "a tract of land containing one hundred and seventy-three acres, lying and being in our county of Wilkes, on a big branch of Luke Lee's Creek, beginning at or near the path that crosses the said branch, that goes from Crane's to Sutton's on a stake, running west 28 chains 50 links to a white oak, on Miller's line, then north 60 chains to a stake, then east 28 chains 50 links to a stake, then south 60 chains to the beginning."<sup>5</sup> A description in a memorandum of contract of the land to be conveyed as a tract of one hundred and fifty acres, "lying on Watery Branch, in Johnston County," is so indefinite that no decree for a conveyance can be based upon it.<sup>6</sup> So a description, "for fifty acres of land, situate and lying on the

<sup>1</sup> Hardy v. Matthews, 38 Mo. 121; Johnson v. Ashland Lumber Co., 52 Wis. 458.

<sup>2</sup> Dickens v. Barnes, 79 N. C. 490. Said Faircloth, J., speaking for the court: "It fails to identify or to furnish the means of identifying under the maxim, *id certum est quod certum reddi potest*, the land in possession of the defendant, the *locus in quo*. It gives neither course nor distance of a single line, nor a single point, stake, or corner, anywhere to begin at. Does the tract lie on the north, south, east, or west side of the lands of Phelps and Pender? What course would the surveyor take if he had a beginning point? These questions cannot be answered by the aid of facts *dehors* the deed, established by parol proof, because it is a patent ambiguity, a question of law for the court, and not one of fact for the jury." When the description in the deed contains no ambiguity, and when none appears when it is applied to the land, the intent must be ascertained from the language used in the deed: Muldoon v. Deline, 135 N. Y. 150.

<sup>3</sup> Brandon v. Leddy, 67 Cal. 43.

<sup>4</sup> Brandon v. Leddy, 67 Cal. 43.

<sup>5</sup> Hinchey v. Nichols, 72 N. C. 66.

<sup>6</sup> Capps v. Holt, 5 Jones Eq. 153.

headwaters of Elk Shoal Creek as far as the waters of Radford Creek, to interfere with no land before sold," is insufficient to admit of the introduction of parol evidence to identify the land.<sup>1</sup>

§ 1011. **Illustrations of uncertainty.**—The description, "beginning at a *point* in Laurel Swamp; thence along the margin of the swamp to a *point*; thence north 85 deg. W. 90 poles; thence 40 deg. W. 86 poles; thence N. 40 deg. east 60 poles to a *point* in a pond; thence along the pond to a *point*; thence S. 77 deg. 88 poles to the beginning, containing one hundred and forty-four acres on the south side of Broad Creek, lot 10," is so vague that no land can be located under it.<sup>2</sup> A *stake*, unless identified, is an imaginary point, and therefore no land can be located under a description in which the beginning call is for a stake, and the remainder of description is for course and distance.<sup>3</sup> In the description in a deed the boundary line was given as running from a creek which

<sup>1</sup> Radford v. Edwards, 88 N. O. 347. The court said, the instrument being a bond for a deed: "As land, unless it has as a tract or lot acquired a name to distinguish it, and by which it is known, can only be ascertained by boundary lines, and separated from all other, the necessity of identifying by a description which admits of a definite location is obvious; and where this cannot be done, no title to it as a distinct portion can pass by the deed or written instrument, the sole office of parol evidence being to fit the description to the thing described, and not to add to the words of description. . . . Recurring to our own case, it may be asked how can the surveyor find a starting point on either creek? And if he could, how far, if he pursues the course of the creek, is he to run, and where stop for a corner? In what direction will he go thence to the other creek, and where find a corner there? And how will he get back to the assumed beginning? These inquiries find no solution in the instrument, and the runnings must be wholly arbitrary in order to ascertain where the fifty acres lie. There is not furnished even any *indicia* of the form of the land; and if form were given, the locations could be made indefinite in number, and all fulfilling equally the conditions and requirements of the language of the bond."

<sup>2</sup> Archibald v. Davis, 5 Jones (N. O.), 322.

<sup>3</sup> Mann v. Taylor, 4 Jones (N. O.), 272; 69 Am. Dec. 750. In this case the description was: "Beginning at a stake, running thence north 500 chains, thence west 250 chains, thence south 500 chains, thence east 250 chains, to the first station." See, also, Massey v. Belisle, 2 Ired. 170.

was several thousand feet in length, without any other designation of the starting point. This rendered the land incapable of identification, for the reason that the condition of the description could be complied with by running a line starting from any position on the creek. The deed, on account of the incurable uncertainty in the description, thus became inoperative.<sup>1</sup> But where a call in a deed is from a certain point "to the hills," this term, though by itself indefinite, will, in case of a studied repetition of that call in all the deeds forming the chain of title, prevail over a call for a specified quantity of land.<sup>2</sup> A description giving the number and subdivisions of certain sections only, but omitting the names of the township, range, or county in which the land is situated, renders the deed void for the patent ambiguity in the description.<sup>3</sup> But if the land is situated in a city, and the land is described as being in a certain city, although the name of the State or county may not be given, the court, in an action of ejectment in which the deed is offered in evidence, will take notice that such city is in a certain county in the State.<sup>4</sup> And where a party

<sup>1</sup> *Le Franc v. Richmond*, 5 Saw. 601.

<sup>2</sup> *Clamorgan v. Hornsby*, 13 Mo. App. 550. See *Clamorgan v. Baden etc. Ry. Co.*, 72 Mo. 139.

<sup>3</sup> *Fuller v. Fellows*, 30 Ark. 657.

<sup>4</sup> *Harding v. Strong*, 42 Ill. 148; 89 Am. Dec. 415. In this case the description was: "Those certain tracts or parcels of land situated in the Haley's addition to the city of Monmouth, known as lot five in block one, and lot seven in block ten, in south addition to said city." A deed is void for uncertainty which describes the land sought to be conveyed as the "southeast corner" of a quarter section, without stating dimensions, or describing land as "the southwest fractional part of the north one-half" of a quarter section, but not stating the quantity or location: *Morse v. Stockman*, 73 Wis. 89. Where land is described as "south part of southeast quarter of section five," and also as the "south part of section five, 225 acres," while the first description is void for uncertainty, recovery may be had of that part of the southeast quarter embraced in the latter description, the latter description being sufficient to pass title to a strip containing 225 acres of equal depth with the southern boundary of the whole section as the base line for measurement: *Tierney v. Brown*, 65 Miss. 563; 7 Am. St. Rep. 679. When land is described as "one-third of a league of land purchased by me of Pomeseno Nanex,

enters in the United States land-office certain tracts of land, describing them by section, township, and range, and they are shown to be in a certain county within the State, and afterward, by a deed executed in the same State, conveys a portion of such land, describing it also by section, township, and range, but not designating the county or State in which the land is situated, it has been held that it will be presumed that the deed was intended to convey land in the State.<sup>1</sup> It seems, however, under any circumstances, that if in the description the names of the town, county, and State are omitted, the grantee nevertheless acquires an equitable interest in the property.<sup>2</sup> The owner of a triangular piece of land executed a deed for a portion of it, the description fixing the eastern line only. The deed recited the grantor's meaning to convey "one-half of what I now own" of the triangle, "said land to be surveyed, and the bounds set." The grantor, however, before any survey was made or bounds set, conveyed to another party the westerly point of the triangle, including more than half of it. The first deed was held void for uncertainty.<sup>3</sup> A description in a deed of the land conveyed as "a part of section 18, in township 7, of range 2 east, containing one hundred and eighty acres," is a patent ambiguity. Parol evidence cannot explain or help it.<sup>4</sup> A deed is void for uncertainty in which the land attempted to be conveyed is described as "three fractions of lot 7, J and K, Fourth and Fifth streets, Sacramento City."<sup>5</sup> A description in a deed and

being his head right," it is insufficient, without further identification, to show that this is the same land patented to the grantor as assignee of Nepomaceno Nanez: *Harkness v. Devine*, 73 Tex. 628. See *Blow v. Vaughan*, 105 N. O. 198. A description consisting of the words "a piece or parcel of land near Bacon Quarter Beach" is too vague and indefinite to convey any title: *George v. Bates*, 90 Va. 839. See, also, *Mutual Building etc. Assn. v. Wyeth* (Ala. Jan. 31, 1895), 17 So. Rep. 45.

<sup>1</sup> *Butler v. Davis*, 5 Neb. 521. And see *Long v. Wagoner*, 47 Mo. 178.

<sup>2</sup> *Lloyd v. Bunce*, 41 Iowa, 660.

<sup>3</sup> *Harvey v. Byrnes*, 107 Mass. 518.

<sup>4</sup> *Brown v. Guice*, 46 Miss. 299.

<sup>5</sup> *Tryon v. Huntoon*, 67 Cal. 325, and cases cited.

mortgage of the land "as the southeast part of the southeast fourth of the northeast quarter of section 36, township 4 south, and range 2 east, containing thirty-two acres," was considered too indefinite to sustain a suit for possession of the land.<sup>1</sup> Possession may render certain, what otherwise would be an uncertain description.<sup>2</sup> If the description is so defective as to render the deed void, a suit for a breach of a covenant of seisin contained in the deed cannot be maintained without showing a mistake and seeking a reformation of the deed.<sup>3</sup>

**§ 1012. What is a sufficient description.**—A deed is not void for uncertainty because there may be errors or an inconsistency in some of the particulars. If a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient.<sup>4</sup> And, generally, the rule may be stated to be that the deed will be sustained, if it is possible from the whole description to ascertain

<sup>1</sup> *Shoemaker v. McMonigle*, 86 Ind. 421.

<sup>2</sup> *Richards v. Snider*, 11 Or. 197. A description of land as "one-half of an acre of land near the wharf or at the wharf," does not render the deed void for uncertainty, if the wharf is described and a parcel of land is surveyed as the land conveyed, or the grantee takes possession: *Simpson v. Blaisdell*, 85 Me. 199; 35 Am. St. Rep. 348.

<sup>3</sup> *Gordan v. Goodman*, 98 Ind. 269. In this case the description was: "The following described real estate, situate in the county of Pulaski, State of Missouri, to wit: And part of the southeast quarter of section 25, commencing at the southwest corner of the southwest quarter of the southeast quarter of said section, running thence west to the cross fence, between Berry Warther and Alvis Goss, thence northeast to the half-mile line, thence south with said line to the place of beginning, containing in all one hundred and eighty acres." As the township and range were not given, the location of the land from the description supplied by the deed became impossible. It is necessary that a definite and certain description of the land to be sold should be contained in an order of the probate court for the sale of the land of a minor by his guardian. Reference to documents not contained in the order itself cannot help an insufficient description in the order: *Hill v. Wall*, 66 Cal. 130.

<sup>4</sup> *Pennington v. Flock*, 93 Ind. 378; *Smiley v. Fries*, 104 Ill. 416. This section is quoted with approval in *McCullough v. Olds*, 108 Cal. 529. If a description by appropriate evidence may be shown to apply to the land, the deed is not void for uncertainty of description: *Fudickar v. East Riverside I. Dist.*, 109 Cal. 41.



and identify the land intended to be conveyed.<sup>1</sup> Thus, a deed was held not to be void for uncertainty where the land conveyed was described as "two hundred and twenty-two and a half acres off the south and west part of the

<sup>1</sup> *Lyman v. Loomis*, 5 N. H. 408; *Eggleston v. Bradford*, 10 Ohio, 312; *Brown v. Warren*, 16 Nev. 228; *Stanley v. Green*, 12 Cal. 148; *Smith v. Dean*, 15 Neb. 432; *Bailey v. Allegheny Nat. Bank*, 104 Pa. St. 425; *Coleman v. Manhattan Beach Improvement Co.*, 94 N. Y. 229; *Vose v. Bradstreet*, 27 Me. 156; *Douthitt v. Robinson*, 55 Tex. 69; *Mason v. White*, 11 Barb. 173; *Brown v. Coble*, 76 N. C. 391; *Berry v. Wright*, 14 Tex. 270; *Farris v. Gilbert*, 50 Tex. 350; *Bosworth v. Sturtevant*, 2 Cush. 392; *Warren v. Makely*, 85 N. C. 12; *Andrews v. Pearson*, 68 Me. 19; *Spect v. Gregg*, 51 Cal. 198; *Andrews v. Murphy*, 12 Ga. 431; *English v. Roche*, 6 Ind. 62; *Enochs v. Miller*, 60 Miss. 19; *Reed v. Lammel*, 28 Minn. 306; *Bowles v. Beal*, 60 Tex. 322; *Hall v. Shotwell*, 66 Cal. 379; *Peck v. Mal-lams*, 10 N. Y. (6 Seld.) 509; *Jackson v. Delancy*, 11 Johns. 365; *Pipkin v. Allen*, 29 Mo. 229; *Harmon v. James*, 15 Miss. (7 Smedes & M.) 111; 45 Am. Dec. 296; *Neel v. Hughes*, 10 Gill & J. 7; *Bird v. Bird*, 40 Me. 398; *Middlebury College v. Cheney*, 1 Vt. 336; *Barlow v. Chicago etc. R. R. Co.*, 29 Iowa, 276; *Roberts v. Grace*, 16 Minn. 126; *Conover v. Wardell*, 22 N. J. Eq. 492; *Everett v. Boardman*, 58 Ill. 429; *Morton v. Root*, 2 Dill. 312; *Charter v. Graham*, 56 Ill. 19; *Alexander v. Knox*, 6 Saw. 54; *McLaughlin v. Bishop*, 35 N. J. L. 512; *Cooley v. Warren*, 53 Mo. 166; *Shewalter v. Pirner*, 55 Mo. 218; *Bybee v. Hageman*, 66 Ill. 519; *Sherman v. McCarthy*, 57 Cal. 507; *Hoar v. Goulding*, 116 Mass. 132; *Thayer v. Torrey*, 37 N. J. L. 339; *Armstrong v. Colby*, 47 Vt. 359; *Billings v. Kankakee Coal Co.*, 67 Ill. 489; *Bartlett v. Corliss*, 63 Me. 287; *Tucker v. Allen*, 16 Kan. 312; *Cohen v. Woollard*, 2 Tenn. Ch. 686; *Auburn Congregational Church v. Walker*, 124 Mass. 69; *Scheiber v. Kaehler*, 49 Wis. 291; *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460; *Hanley v. Blackford*, 1 Dana, 1; 25 Am. Dec. 114; *Cilley v. Childs*, 73 Me. 130; *Dunn v. Tousey*, 80 Ind. 288; *McElhinney v. Kraus*, 10 Mo. App. 218; *Bowen v. Galloway*, 98 Ill. 41; *Sharp v. Thompson*, 100 Ill. 447; 39 Am. Rep. 61; *Wiley v. Lovely*, 46 Mich. 83; *Whitney v. Robinson*, 53 Wis. 309; *Irving v. Cunningham*, 58 Cal. 306; *Keening v. Ayling*, 126 Mass. 404; *Paroni v. Ellison*, 14 Nev. 60; *Friedman v. Nelson*, 53 Cal. 589; *Prettyman v. Walston*, 34 Ill. 175; *Miller v. Mann*, 55 Vt. 475; *Walsh v. Ringer*, 2 Ohio, 327; 15 Am. Dec. 555; *Camley v. Stanfield*, 10 Tex. 546; 60 Am. Dec. 219; *Bullen v. Runnels*, 2 N. H. 255; 9 Am. Dec. 55. The object of a description may be said to be to prevent imposition: *Bates v. Bank of Missouri*, 15 Mo. 309; 55 Am. Dec. 145. See, also, as to construction of particular descriptions, *Howard v. Pepper*, 136 Mass. 28; *Mast v. Tibbles*, 60 Tex. 301; *Bowles v. Beal*, 60 Tex. 322. In a mortgage the land affected was described as being north of the "ground of the O. C. C. & I. R. R." The court held that the description was not rendered void by the use of the word "ground" instead of "right of way": *Pence v. Armstrong*, 95 Ind. 191.

south half of section 24, T. 1, R. 7 west, in De Soto County."<sup>1</sup> And a deed describing the land conveyed as situated in a certain county and school district, and bounded by certain metes and bounds and visible monuments, but omitting to state the section and township, was held not to be void for uncertainty.<sup>2</sup> It is not essential to the validity of a deed that the description should be by boundaries, courses, or distances, or by reference to monuments. If the description is general, the particular subject matter to which the description applies may be ascertained by parol evidence, and the deed will not be held void for uncertainty, if, with the aid of such evidence, the land intended to be conveyed can be located. Thus, the property intended to be conveyed was described in the deed as "Pelican beach, near Barren island, in the town of Flatlands." The name "Pelican beach" had originally been applied to the salt meadows, marsh, and beach, on the westerly end of Barren island. Subsequently an inlet opened across the beach, and the greater portion of it was thereby separated from the island. The title of the grantee to the beach was undisputed, and it was held in an action of ejectment that the deed was not void for uncertainty, but conveyed the title to that portion of the beach cut off by the inlet.<sup>3</sup> The court will not

<sup>1</sup> Goodbar v. Dunn, 61 Miss. 618.

<sup>2</sup> Dorr v. School District, 40 Ark. 237. Said the court, per Smith, J: "Is the description so defective that it is impossible, by the aid of parol evidence, to locate the land? It is in a certain county, and in a certain school district, which has definite boundaries, is parcel of the tract upon which stood the residence of Benjamin I. Edwards, contains three acres, and is described by metes and bounds, and by visible monuments, to wit, the graveyard, the schoolhouse, the highway, corner stakes, and initial tree from which to start. And defendant had gone into possession. A competent surveyor could have found the land without much difficulty. In conveyancing, lawyers commonly follow the system of notation established by the general government, distinguishing lands according to their legal subdivisions. This furnishes a description at once convenient and accurate. But it is not necessary to mention the section, township, and range: Cooper v. White, 30 Ark. 513. When the land lies in a city or town, the description is usually by reference to the lots and blocks of a recorded plat."

<sup>3</sup> Coleman v. Manhattan Beach Improvement Co., 94 N. Y. 229. A

resort to arbitrary rules of construction, if, without so doing, the intention of the parties can be ascertained. The deed and its descriptive clauses will be construed as any other contract would be.<sup>1</sup> When a doubtful description is to be construed, the court should endeavor to assume the position of the parties, the circumstances of the transaction should be carefully considered, and in the light of those circumstances, the words should be read and interpreted.<sup>2</sup>

§ 1013. **Illustrations.**—A grantor described land conveyed as “my homestead farm situated in said Buckfield,” and described the various parcels of which it was composed, and gave as a description of the last parcel “twelve and a half acres out of lot numbered eight in the first range.” It was held that the whole parcel passed, notwithstanding it contained twenty-five acres.<sup>3</sup> A description is sufficiently definite if it gives the corner of a certain lot as the beginning, and courses and distances from this, with metes and bounds.<sup>4</sup> A description in a deed of, “all lands and real estate belonging to the said party of the first part, wherever the same may be situated,” is suffi-

sheriff's deed to a lot in a city describing it as “part of lot 17, fronting on Gallatin street fifty feet, extending eastwardly seventy-three feet, as the property of said Isaac Jamison,” was held not to be void on its face for uncertainty, for it might be shown by parol evidence that the extent of the frontage of the lot on Gallatin street was only fifty feet; or that Jamison, when the deed was executed, was the owner of a defined part of the lot fronting on such street measuring fifty feet, and known “as the property of said Isaac Jamison.” But when it is shown by extrinsic proof that the frontage of lot 17 on Gallatin street was about one hundred and forty-seven feet, all of which had been conveyed to Jamison except about twenty-five feet, and it is not shown that any part of this had been disposed of by Jamison at the time of the execution of the deed, and it is not shown that the fifty feet front had ever been separated from the other, or that there was any identification of any fifty feet known “as the property of said Isaac Jamison,” the deed on account of the insufficient identification of the property is void for uncertainty: *Bernstein v. Humes*, 71 Ala. 260.

<sup>1</sup> *Kimball v. Semple*, 25 Cal. 440.

<sup>2</sup> *Truett v. Adams*, 66 Cal. 218.

<sup>3</sup> *Andrews v. Pearson*, 68 Me. 19.

<sup>4</sup> *Meikel v. Greene*, 94 Ind. 344.

cient to pass any land belonging to the grantor at the time of the execution of the deed.<sup>1</sup> A deed for "one-half of my lot," when it is shown by extrinsic evidence that the grantor owned but one lot at the time in the place, is not void for vagueness or uncertainty of description. The grantee takes as a tenant in common of an undivided one-half of the lot.<sup>2</sup> Where land was situated in the bend of a river, it was held that a description in which one of the lines was described as running "nearly due west along the top or brow of the bluff on the south side of said river," was sufficiently definite and certain.<sup>3</sup> A deed in which the land is described as "beginning at a servisberry corner, thence north to a white oak, thence east to a white oak, thence south to limestone quarry, thence to a white oak," when accompanied by a transfer of possession, and when it is shown that the trees are marked, is sufficient to pass the title, although no mention is made of the locality of the land.<sup>4</sup> In Ohio, it has been held that a description of land as "seventy acres lying and being in the southwest corner" of a certain section, is sufficiently definite, and that the land conveyed will lie in a square.<sup>5</sup> In a deed conveying several parcels of land the description was: "The following tracts or parcels of land, all of which lying and being in the military tract in the State of Illinois, that is to say, the northwest  $\frac{1}{4}$ , section 27, 11 S., 2 W.," with several other tracts

<sup>1</sup> *Pettigrew v. Dobbelaar*, 63 Cal. 396. And see *Brown v. Warren*, 16 Nev. 228.

<sup>2</sup> *Lick v. O'Donnell*, 3 Cal. 59; 58 Am. Dec. 383.

<sup>3</sup> *Smith v. Dean*, 15 Neb. 432.

<sup>4</sup> *Banks v. Ammon*, 27 Pa. St. 172.

<sup>5</sup> *Walsh v. Ringer*, 2 Ohio, 327; 15 Am. Dec. 555. Said the court: "The general position of the land conveyed is given with sufficient certainty. It is in the southwest corner. According to the rules of decision, both in this State and in Kentucky, that corner is a base point from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines the quantity conveyed. From this point the section lines extend north and east, so as to fix the boundary west and south, the east and north boundaries only are to be established by construction, and the rule referred to gives them with sufficient certainty."

with the word "section" omitted. It was held that the word "section" would be understood, and hence that the description of the other tracts was sufficient.<sup>1</sup> A description of the land conveyed as, "all my right, title, and interest in and to a parcel of land situate in the town of San Francisco, being block No. 9, the same on which I now reside. The part thus donated commences at the northeast corner of said block, running twenty-five varas west from said corner, thence back one hundred varas"—is sufficient to sustain the deed. The land thereby conveyed would be a strip off the easterly side of the block, which in width would be twenty-five varas, and in depth one hundred varas.<sup>2</sup> Although there may be a deflection of twenty-five degrees from the cardinal points of the compass in the lines of a lot, a description of the land conveyed as the "north twenty feet" of such lot is sufficiently defined.<sup>3</sup> A deed in which the land to be conveyed was described as "commencing at the southeast corner of section 21, township 84, range 26," was held to be sufficient, notwithstanding that the deed did not mention the county and State in which the land was situated, it appearing that the township and range specified were nowhere else than in the county and State in which the land was claimed to lie.<sup>4</sup> A deed is sufficient so far as certainty of description is concerned, if it states the name of the tract and county, and refers to deeds of record clearly describing the land for a more specific description.<sup>5</sup> Where the description is uncertain, reference may be made to prior deeds conveying the same land.<sup>6</sup> If the description is "the north half of

<sup>1</sup> *Bowen v. Prout*, 52 Ill. 354.

<sup>2</sup> *Le Levillain v. Evans*, 39 Cal. 120. See *Banks v. Moreno*, 39 Cal. 233.

<sup>3</sup> *Jenkins v. Sharpf*, 27 Wis. 472.

<sup>4</sup> *Beal v. Blair*, 33 Iowa, 318.

<sup>5</sup> *Steinbeck v. Stone*, 53 Tex. 382. See, also, *Knowles v. Torbitt*, 53 Tex. 557.

<sup>6</sup> *Bowman v. Wettig*, 39 Ill. 416. Where land is described in general terms, and also as all the lands of the grantors and each of them, the description can be made certain by proof, and is sufficient: *Harvey v. Edens*, 69 Tex. 420; 6 S. W. Rep. 306. The following description is not

the southwest quarter the southwest quarter," of a certain section, the deed will convey the north half of the southwest quarter of the southwest quarter of the section, where

void for uncertainty: "All the lands contained in Patent No. 383, vol. 15, first class, to me granted by the State of Texas, and that have not been legally sold or disposed of for location, the above lands being situate and lying in the county of W., and fully described in a patent which accompanies this deed: Falls Land and Cattle Co. v. Chisholm, 71 Tex. 523; 9 S. W. Rep. 479. A sheriff's deed giving accurately only one boundary line, but describing the land by name and features familiar in that neighborhood, is not void for uncertainty where it clearly appears that it is well known by that name, and has, in previous conveyances, been described by it, and a surveyor who surveyed the tract previously easily found the land with the sheriff's deed before him: Hammond v. Johnston, 93 Mo. 198; 6 S. W. Rep. 83; Hammond v. Gordon, 93 Mo. 223; Hammond v. Horton, 6 S. W. Rep. 94 (Mo. Nov. 28, 1887). See, also, Wolfe v. Dyer, 95 Mo. 545; 8 S. W. Rep. 551. A deed which did not state the State in which the land was situated was held not to be void for uncertainty: Calton v. Lewis, 119 Ind. 181; 21 N. E. Rep. 475. The words "quarter of" preceding the word "section" may be supplied by construction as a palpable omission: Campbell v. Carruth, 32 Fla. 264. See, also, Smith v. Nelson, 110 Mo. 552; Bryan v. Wisner, 44 La. Ann. 832; Slack v. Dawes, 3 Tex. Civ. App. 520; 22 S. W. Rep. 1053; Johnson v. Williams, 67 Hun, 652. Where the land described is "all those parcels of land sold to" the grantor by a third person, and such person had agreed to sell more land than he actually conveyed to the grantor, parol evidence may be received for the purpose of explaining whether the deed conveyed the land described in the agreement or only that actually conveyed by such person: Bradish v. Yocum, 130 Ill. 386. The fourth side of a rectangle may be supplied where the intent of the parties is clear, and the grantee has entered into possession of the rectangular tract with the grantor's consent: Ray v. Pease, 95 Ga. 153; 22 S. E. Rep. 190. Where it appears from the description that the shape of the land is triangular, if the quantity of land and the angle between two of the lines are given, the description is sufficient: Wells v. Heddenberg (Tex. Civ. App.), 30 S. W. Rep. 702. A deed is not void for uncertainty where a right of way is conveyed described as a strip one hundred feet wide, of which the center line of the route of the railroad company to whom the deed is made, as "now surveyed, staked, and located, is the center line of said route," over certain land which is specifically described: Denver M. & A. Ry. Co. v. Lockwood, 54 Kan. 586. See, also, Thompson v. Southern Cal. M. R. Co., 82 Cal. 497. Where land is described as one hundred and thirty-four acres on the north side of a lot of land made by statute, a square, described by its number, district, and county, the description will embrace such a parallelogram as would result from drawing a line across a line running parallel with its northern boundary, so as to cut off one hundred and thirty-four acres: Gress Lumber Co. v. Coody, 94 Ga. 519. Although the field notes as described in a deed show a mistake because



the call for quantity supports such a construction.<sup>1</sup> If the description uses the term "half," this is not to be taken in its literal sense, if a different meaning is indicated by the context, by concomitant circumstances, or by subsequent acts of the parties.<sup>2</sup> A description designating a

they do not close, yet the instrument is admissible in evidence when it appears from the deed that the scrivener in copying the field notes, mistook the character used to denote degrees for a cipher: *Coffee v. Hendricks*, 66 Tex. 676. A deed is not void for uncertainty where the description is so many acres to be taken from a larger tract at the selection of the grantee: *Dohoney v. Womack*, 1 Tex. Civ. App. 354. Nor is a deed void where an uncertainty as to the identity of the land described can be explained by extrinsic evidence: *McWhirter v. Allen*, 1 Tex. Civ. App. 649.

<sup>1</sup> *Burnett v. McCluey*, 78 Mo. 675.

<sup>2</sup> *Jones v. Pashby*, 48 Mich. 634. For cases in which particular descriptions have on various points been construed, see *Kirch v. Davies*, 55 Wis. 287; *Platt v. Jones*, 43 Cal. 219; *Winslow v. Cooper*, 104 Ill. 235; *Fratt v. Woodward*, 32 Cal. 219; 91 Am. Dec. 573; *Dwight v. Packard*, 49 Mich. 614; *Farley v. Deslonde*, 58 Tex. 588; *Altschul v. San Francisco etc. Assn.*, 43 Cal. 171; *Smiley v. Fries*, 104 Ill. 416; *Cox v. Hayes*, 64 Cal. 32; *Atchison, Topeka etc. R. R. Co. v. Patch*, 28 Kan. 470; *Santa Clara Mining Assn. v. Quicksilver Mining Co.*, 8 Saw. 330; 17 Fed. Rep. 657; *Small v. Wright*, 74 Me. 428; *Armstrong v. Dubois*, 90 N. Y. 95; *Parkinson v. McQuaid*, 54 Wis. 473; *Hatch v. Brier*, 71 Me. 542; *Avery v. Empire Woolen Co.*, 82 N. Y. 582; *Cunningham v. Webb*, 69 Me. 92; *Hathorn v. Hinds*, 69 Me. 326; *Montgomery v. Reed*, 69 Me. 510; *Jewett v. Hussey*, 70 Me. 433; *Ames v. Hilton*, 70 Me. 36; *Snow v. Orleans*, 126 Mass. 453; *Herrick v. Ammerman*, 32 Minn. 544; *Hampton v. Helms*, 81 Mo. 631; *Irwin v. Towne*, 42 Cal. 326; *Garwood v. Hastings*, 38 Cal. 216; *De Levillain v. Evans*, 39 Cal. 120; *Mayo v. Mazeaux*, 38 Cal. 442; *Lake Vineyard Land and Water Assn. v. The San Gabriel etc. Assn.*, 58 Cal. 51; *Persinger v. Jubb*, 52 Mich. 304; *Frost v. Angier*, 127 Mass. 212; *White v. Gay*, 9 N. H. 127; 31 Am. Dec. 224; *Melvin v. Proprietors of Locks, etc.*, 5 Met. 15; 38 Am. Dec. 384; *Kirkland v. Way*, 3 Rich. 4; 45 Am. Dec. 752; *Gourdin v. Davis*, 2 Rich. 481; 45 Am. Dec. 745; *Patterson v. Trask*, 30 Me. 28; 50 Am. Dec. 610; *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371. In a deed one call from a bound specified by courses and distances, was "to the road," etc. The next call then proceeded "in said road," etc. It was held that the first call was ambiguous, it not appearing as to what point in the road the first call ran to, or whether it only ran to the road, and this was a question for the jury: *Ames v. Hilton*, 70 Me. 36. Where the calls were, "thence by the road to A's land, thence southerly by said A's land to B's land," it was held in a real action that by "A's land" was meant land owned by him, not land possessed by him, especially as by giving this construction to the language, exactly the amount of land to which the grantor had title would be conveyed: *Jewett v. Hussey*, 70 Me. 433.



tract of land as "ten acres off the northwest corner of said quarter section," is not indefinite and uncertain. Such a description means ten acres in the corner lying in a square, and bounded by four equal sides. If, however, the only words of description are "ten acres more or less of said quarter section," the description is so uncertain as to render the description void.<sup>1</sup> A deed is void for uncertainty where the starting point is given as "commencing at the N. W. of the N. W., S. E. of section 19."<sup>2</sup> So a description, the "S.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ " of a section is fatally defective. There cannot be a southeast half of a section. If the word "quarter" was used, making the description the "S.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ " of the section, the description would be good.<sup>3</sup> If one of the boundaries is described as a line commencing a certain distance below the mouth of a creek, and to run at right angles with the creek, the deed, in the absence of anything on its face to indicate that the creek does not run in a course perfectly straight, or that a straight line drawn along the thread of the stream would fail to intersect the beginning point of the contested line, is not void for uncertainty on its face with respect to such line.<sup>4</sup> Where the land is described as "Lot No. 62, containing 50 52-100 acres, situate in the town and county of Santa Barbara, State of California, and numbered and marked on the official map or plan of outside lands of the town of Santa Barbara, made by William Norway, Surveyor," the court cannot say, as a matter of law, that the deed is void for uncertainty in the description.<sup>5</sup> An entire tract known by a general name may be described by such name. The same principle applies where a tract designated by a general name is excepted from a grant by metes and

<sup>1</sup> *Wilkinson v. Roper*, 74 Ala. 140.

<sup>2</sup> *Pry v. Pry*, 109 Ill. 466.

<sup>3</sup> *Pry v. Pry*, 109 Ill. 466.

<sup>4</sup> *Irwin v. Towne*, 42 Cal. 328. See *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103.

<sup>5</sup> *Thompson v. Thompson*, 52 Cal. 154. See, also, *Meyers v. Farquharson*, 46 Cal. 191, as to description in a bill of sale of a mining claim.

bounds. The excepted tract so described does not pass by the deed.<sup>5</sup> A deed is not void for uncertainty of description in which the land conveyed is described as "all the right, title, interest, and demand which the grantor has or ought to have in and to all those lots and parcels of land lying in the town of Silverton, which remained undivided amongst the proprietors of said townsite, upon delivery of deeds by the trustee of said townsite to the said proprietors, the same being one-twelfth undivided interest in said undivided lots."<sup>1</sup>

**§ 1014. Land of reputed owner as boundary.**—If the boundaries are given as the lands of others, the description may be sufficient, although the true names of the owners are not given, if the boundaries can otherwise be sufficiently identified. Thus the land conveyed in a deed was described as "bounded on the north by the land of Joseph C. Palmer." The fact was that Palmer did not own the land on the north, but the grantor had always

<sup>5</sup> *Truett v. Adams*, 66 Cal. 218. Where in one deed land was described as "Gift Map No. 2, lots No. 398 to 405 inclusive," and in a second deed executed in Illinois, the description was, "all lands and real estate belonging to the said party of the first part wherever the same may be situated," the court held that the first description was sufficient if there was a map in San Francisco known as "Gift Map No. 2," and that if the lands in controversy were owned by the grantor named in the second deed they passed by it: *Pettigrew v. Dobbelaar*, 63 Cal. 396. See *Penry v. Richards*, 52 Cal. 496; *Lick v. O'Donnell*, 3 Cal. 59; 58 Am. Dec. 383. As to certainty of description required in a decree of foreclosure, see *Crosby v. Dowd*, 61 Cal. 558. A, who owned an undivided tenth part of a tract of land, executed a deed to B, describing the land conveyed as "all of the grantor's right, title, and interest in the following described property, viz: One-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract or parcel of land," etc. B, the grantee, subsequently executed a deed to C, conveying "all his right, title, interest, etc., in the following property, to wit: One-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract or parcel of land," etc. The court held that by the latter deed only an undivided half-interest of B, that is, an undivided one-fortieth of the land, passed to C: *Hayes v. Wetherbee*, 60 Cal. 396.

<sup>1</sup> *Blair v. Burns*, 8 West C. Rep. 285.

recognized such land as belonging to him for the reason that he had been the agent who purchased it for another. The court held that the northern boundary was sufficiently identified.<sup>1</sup>

**§ 1015. General description and unrecorded deed.** Where a grantor executes a deed of all his real estate without description, the grantee obtains only such property as is vested in the grantor by a legal title. Property conveyed by an unrecorded deed, of which the grantee was ignorant, does not, by a deed in which the description is thus general, pass to him.<sup>2</sup>

**§ 1015 a. Situation and condition shown by parol evidence.**—The meaning that the parties attached to the language employed, especially in matters of description, may be shown by parol evidence relating to the situation and condition of the subject matter. The deed should be given a favorable construction, and one as near the meaning and intention of the parties as the rules of law will allow.<sup>3</sup> A deed conveying all the lands of the grantor is not void for uncertainty of description, and passes the title to all land in which he has an interest. Nor does the fact that the description excepts from the operation of the deed all property of the grantor exempt from execution render the conveyance void for uncertainty in description, as that is certain which may be made certain.<sup>4</sup> The declarations of the grantor subsequently made relating to the boundaries of the land conveyed are admissible in evidence against those claiming title under him.<sup>5</sup> But declarations by a former owner, under whom a person claims, made forty years before the commencement of a suit to recover a strip of land bounded

<sup>1</sup> *McKeon v. Millard*, 47 Cal. 581.

<sup>2</sup> *Jamaica etc. Corp. v. Chandler*, 9 Allen, 159.

<sup>3</sup> *Lego v. Medley*, 79 Wis. 211; 24 Am. St. Rep. 706; *Lyman v. Babcock*, 40 Wis. 512; *Dunn v. English*, 23 N. J. L. 126; *Cravens v. White*, 73 Tex. 577; 15 Am. St. Rep. 803.

<sup>4</sup> *McCulloh v. Price*, 14 Mont. 320; 43 Am. St. Rep. 637.

<sup>5</sup> *Simpson v. Blaisdell*, 85 Me. 199; 35 Am. St. Rep. 348.

by a river, are inadmissible to show that the river has changed its bed.<sup>1</sup> But the rule is well established that in case of a disputed boundary line which is in doubt, the declarations of the grantor, made at and before the execution of the deed, as to the location of the boundary line, may be received in evidence against him and those who claim under him.<sup>2</sup> Parol evidence may be received to fix boundaries by showing that when the grantor, in delivering the deed, pointed out stakes, and said the land conveyed lay between them, and that afterward the grantor and grantee erected fences inclosing the land between the stakes.<sup>3</sup>

§ 1016. **Surplusage.**—The deed will not be void for uncertainty from the fact that the description in part is false or incorrect, if there are sufficient particulars given to enable the premises intended to be conveyed to be identified. Thus, where a lot is described by its number on a recorded plat, which in itself is a sufficient description, but there is a misdescription in a boundary line, such misdescription will be rejected.<sup>4</sup> In a deed the land

<sup>1</sup> Taylor v. Glenn, 29 S. C. 292; 13 Am. St. Rep. 724.

<sup>2</sup> Sharp v. Blankenship, 79 Cal. 411; McFadden v. Ellmaker, 52 Cal. 349; Stanley v. Green, 12 Cal. 148; McFadden v. Wallace, 38 Cal. 51.

<sup>3</sup> Hooten v. Comerford, 152 Mass. 591; 23 Am. St. Rep. 861. See, also, Lovejoy v. Lovett, 124 Mass. 270; Dodd v. Witt, 139 Mass. 63; 52 Am. Rep. 700; Reed v. Proprietors of Locks and Canals, 8 How. 274; Miles v. Barrows, 122 Mass. 579. Where the deed described the land conveyed as "parts" of certain lots, without stating what parts, it may be shown by parol evidence what land was intended to be conveyed. The ambiguity may be explained: Shore v. Miller, 80 Ga. 93; 12 Am. St. Rep. 239. See, also, Bonaparte v. Carter, 106 N. C. 534; Houston v. Bryan, 78 Ga. 181; 6 Am. St. Rep. 252.

<sup>4</sup> Union Railway & Transit Co. v. Skinner, 9 Mo. App. 189; Thompson v. Ela, 60 N. H. 562; Husbands v. Stemple, 13 Mo. App. 589; Reamer v. Nesmith, 34 Cal. 624; Irving v. Cunningham, 66 Cal. 15; Beaumont v. Field, 1 Barn. & Ald. 247; Norwood v. Byrd, 1 Rich. 135; 42 Am. Dec. 406; Clark v. Munyan, 22 Pick. 410; 33 Am. Dec. 752; White v. Gay, 9 N. H. 126; 31 Am. Dec. 224; Morton v. Jackson, 1 Smedes & M. 494; 40 Am. Dec. 107. See, also, Shewalter v. Pirner, 55 Mo. 218; Cooley v. Warren, 53 Mo. 166; Seaman v. Hogeboom, 21 Barb. 398; Hobbs v. Payson, 85 Me. 498; 27 Atl. Rep. 519; Sink v. McManus, 49 Hun, 583; Maker v. Lazell, 83 Me. 562; 23 Am. St. Rep. 795; 22 Atl. Rep. 474; Arambula v. Sulli-

was described as lot 77 of the original plat of the town as recorded, but the original plat did not contain over twenty-nine lots, and another plat, which, on account of defects

van, 80 Tex. 615; 16 S. W. Rep. 438; Barnard *v.* Good, 44 Tex. 638; Coffey *v.* Hendricks, 66 Tex. 676; Kingston *v.* Pickens, 46 Tex. 99; Oliver *v.* Mahoney, 61 Tex. 610; Smith *v.* Chatham, 14 Tex. 322; Birdseye *v.* Rogers (Tex. Civ. App.), 26 S. W. Rep. 841; Peterson *v.* Ward, 5 Tex. Civ. App. 208; 23 S. W. Rep. 637; Minor *v.* Powers (Tex. Civ. App.), 24 S. W. Rep. 710; Sherwood *v.* Whiting, 54 Conn. 330; 1 Am. St. Rep. 116; Evans *v.* Greene, 21 Mo. 170; Gibson *v.* Bogy, 28 Mo. 478; Rutherford *v.* Tracy, 48 Mo. 325; 8 Am. Rep. 104; Jamison *v.* Fopiano, 48 Mo. 194; West *v.* Bretelle, 115 Mo. 653; 22 S. W. Rep. 705; Bray *v.* Adams, 114 Mo. 486; 21 S. W. Rep. 853; Johnson *v.* Simpson, 36 N. H. 91; Harvey *v.* Mitchell, 31 N. H. 475; Eastman *v.* Knight, 35 N. H. 551; Benton *v.* McIntyre, 64 N. H. 598; 15 Atl. Rep. 413; Driscoll *v.* Green, 59 N. H. 101; Elliott *v.* Thatcher, 2 Met. 44; Worthington *v.* Hylyer, 4 Mass. 196; Melvin *v.* Proprietors of Locks and Canals, 5 Met. 15; 38 Am. Dec. 384; Bond *v.* Fay, 12 Allen, 86; Bosworth *v.* Sturtevant, 2 Oush. 392; Hastings *v.* Hastings, 110 Mass. 280; Morse *v.* Rogers, 118 Mass. 573-578; Lovejoy *v.* Lovett, 124 Mass. 270; Morse *v.* Rogers, 118 Mass. 572; Auburn Cong. Church *v.* Walker, 124 Mass. 69; Cassidy *v.* Charlestown Sav. Bank, 149 Mass. 325; 21 N. E. Rep. 372; Thompson *v.* Jones, 4 Wis. 106; Green Bay *v.* Hewitt, 55 Wis. 96; 42 Am. Rep. 701; 12 N. W. Rep. 382; Lochte *v.* Austin, 69 Miss. 271; 13 So. Rep. 838; Miller *v.* Travers, 8 Bing. 244; Winnipisiogee Paper Co. *v.* N. H. Land Co., 59 Fed. Rep. 542; Hamm *v.* San Francisco, 17 Fed. Rep. 119; Wade *v.* Deray, 50 Cal. 876; Wilcoxson *v.* Sprague, 51 Cal. 640; Reed *v.* Spicer, 27 Cal. 57; Jackson *v.* Clark, 7 Johns. 217; Baldwin *v.* Brown, 16 N. Y. 359; Jackson *v.* Barringer, 15 Johns. 471; Loomis *v.* Jackson, 19 Johns. 449; Schoenewald *v.* Rosenstein, 25 N. Y. St. Rep. 964; 5 N. Y. Supp. 766; Robinson *v.* Kime, 70 N. Y. 147; Case *v.* Dexter, 106 N. Y. 548; Muldoon *v.* Deline, 135 N. Y. 150; Danziger *v.* Boyd, 21 J. & S. 398; Llewellyn *v.* Earl of Jersey, 11 M. & W. 183; Duncan *v.* Madard, 106 Pa. St. 562; Wiley *v.* Lovely, 46 Mich. 83; 8 N. W. Rep. 716; Wilt *v.* Outler, 38 Mich. 189; Lodge *v.* Lee, 6 Cranch, 237; Land Co. *v.* Saunders, 103 U. S. 316; Jackson *v.* Sprague, 1 Paine, 494; Prentice *v.* Stearns, 113 U. S. 435; White *v.* Herman, 51 Ill. 243; 99 Am. Dec. 543; Kruse *v.* Wilson, 79 Ill. 233; Myers *v.* Ladd, 26 Ill. 415; Holston *v.* Needles, 115 Ill. 461; 5 N. E. Rep. 530; Stevens *v.* Wait, 112 Ill. 544; Bowen *v.* Allen, 113 Ill. 53; 55 Am. Rep. 398; Clements *v.* Pearce, 63 Ala. 284; Chadwick *v.* Carson, 78 Ala. 116; Bryan *v.* Wisner, 44 La. Ann. 832; 11 So. Rep. 290; Simpson *v.* King, 1 Ired. Eq. 11; Proctor *v.* Pool, 4 Dev. 370; British and American Mortgage Co. *v.* Long, 113 N. C. 123; 18 S. E. Rep. 165; Shaffer *v.* Hahn, 111 N. C. 1; 15 S. E. Rep. 1033; Raymond *v.* Coffey, 5 Or. 132; Keith *v.* Reynolds, 3 Me. 393; Cate *v.* Thayer, 3 Me. 71; Chandler *v.* Green, 69 Me. 350; Andrews *v.* Pearson, 68 Me. 19; Abbott *v.* Abbott, 53 Me. 356; Jones *v.* Buck, 54 Me. 301; Getchell *v.* Whittemore, 72 Me. 393; Kinsey *v.* Satterthwaite, 88 Ind. 342.

in execution, was not entitled to record, described the land erroneously as lot 78. There was another plat which contained the lot, but this plat was not recorded, and it was shown that the lot, for more than twenty-five years, had been held, taxed, and dealt with as lot 77. Under these circumstances, it was held that the deed was not invalidated for the error in the description.<sup>1</sup> In a mortgage several lots were described by numbers, with the additional clause, "being all of block 25." This block did not contain the numbers mentioned in the instrument, but they were in another block. It appeared, however, that it was the intention of the mortgagor to mortgage the block in which he resided, and that he resided in block 25, and, accordingly, it was held that block 25 was subject to the mortgage.<sup>2</sup> Where there are several calls in a deed, and, with the exception of one, they may all be applied upon the face of the earth, constituting a correct and intelligent description of the lot to which they refer, the one that does not apply will be rejected as surplusage, and the others will prevail.<sup>3</sup> A description in a deed, made in 1840, stated that the land was situated in the county of Lenawee and territory of Michigan, and part of the land conveyed was assigned to a certain township and range. The township and range described were in Monroe county, but not in Lenawee county, and Michigan was no longer a territory at the time at which the deed bore date; but, in the construction of the deed, it was held to convey the land in the township and range mentioned, and the general description by the name of the county was rejected.<sup>4</sup> If the deed contains two descriptions, one correct and the other false in fact, the lat-

<sup>1</sup> Wiley v. Lovely, 46 Mich. 88. See Vose v. Handy, 2 Greenl. 323; 11 Am. Dec. 101.

<sup>2</sup> Sharp v. Thompson, 100 Ill. 447; 39 Am. Rep. 61.

<sup>3</sup> Chandler v. Green, 69 Me. 350.

<sup>4</sup> Wilt v. Cutler, 38 Mich. 189. But if all the particulars are essential to the description, the estate conveyed must agree with every part of the description. See Peck v. Mallams, 10 N. Y. 533; Kruse v. Wilson, 79 Ill. 235.

ter should be rejected as surplusage.<sup>1</sup> Where one of two different descriptions applies to land to which the grantor had title, and the other to land which he did not own, the former will be taken as the true description, and the latter will be rejected as false.<sup>2</sup> If sufficient remains after rejecting a part of the description which is false, the deed will take effect.<sup>3</sup>

§ 1017. *Illustrations.*—A deed described the land conveyed as the “west half of lot 284, and half of gore, both containing fifty acres, being the same, more or less, as surveyed by Israel Johnson and Isaac Boynton, by order of the court of sessions.” As a matter of fact the persons named never surveyed the land described by order of any court, but, as a committee of the court of common pleas, duly partitioned the lot and assigned the west half to the grantor. The court held that if the words relating to the survey were to be regarded as erroneous, there was a sufficient description in the remaining language, “west half of lot 284,” to pass the title.<sup>4</sup> In a deed the description was: “A certain sawmill site in Levant village, with the sawmill, machinery, and fixtures thereon standing, including shingle machine and cutting-off saw, also one undivided fourth part of mill common,” with other

<sup>1</sup> *Reed v. Spicer*, 27 Cal. 57. And see, also, *Harvey v. Mitchell*, 31 N. H. 575; *Abbott v. Abbott*, 53 Me. 356; *Bond v. Fay*, 12 Allen, 86; *Lane v. Thompson*, 43 N. H. 320; *Vose v. Handy*, 2 Greenl. 322; 11 Am. Dec. 101; *Reed v. Proprietors of Locks, etc.*, 8 How. 274; *Robertson v. Mosson*, 26 Tex. 248; *Eastman v. Knight*, 35 N. H. 551; *Thompson v. Jones*, 4 Wis. 106; *White v. Gay*, 9 N. H. 126; 31 Am. Dec. 224; *Jackson v. Root*, 18 Johns. 60; *Gibson v. Bogy*, 28 Mo. 478; *Myers v. Ladd*, 28 Ill. 415; *Norwood v. Byrd*, 1 Rich. 135; 42 Am. Dec. 407. And see, also, *Hibbard v. Hurlburt*, 10 Vt. 173; *Jackson v. Barringer*, 15 Johns. 471; *Clough v. Bowman*, 15 N. H. 504; *Goodright v. Pears*, 11 East, 58.

<sup>2</sup> *Piper v. True*, 36 Cal. 606.

<sup>3</sup> *Irving v. Cunningham*, 66 Cal. 15. But where a grantor did not have an interest beyond an estate for life, a deed executed by him purporting to convey “one divided fourth part” of the land, cannot be construed as conveying an undivided fourth part of the property. The court cannot reject the word “divided” from the description: *Ford v. Unity Church Soc.*, 120 Mo. 498; 41 Am. St. Rep. 711.

<sup>4</sup> *Abbott v. Abbott*, 53 Me. 356.



parcels particularly described, and adding, "meaning to convey to said Baxter all the premises which said William Bradbury purchased of Benjamin Garland, by deed, dated March 19, 1832, and recorded in Penobscot Registry, book 28, page 448, with all the privileges, and subject to all the restrictions therein expressed, reference thereto for a more particular description of said premises." The court decided that by this description the mill and the whole land thereunder would pass, notwithstanding that by the deed to which reference was had, the grantor acquired but a part of the property upon which the mill was erected.<sup>1</sup> A deed bearing date of April 13, 1838, described the lands intended to be conveyed, as described in a deed from A to the grantor, "of even date herewith," referring to the latter deed for a description of the premises. Only one deed had been made by A to the grantor, and this deed was dated April 5, 1838. In the construction of the description the court rejected the words "of even date herewith" as erroneous. But as there was no doubt as to the deed or the land intended, the title was held to pass.<sup>2</sup> So in the case of a devise of "all my homestead farm, being the same farm whereon I now live, and the same which was devised to me by my honored father," the whole of the homestead farm will pass, although the fact may be that a part of the farm was not devised by the father.<sup>3</sup> Where an island is described by its name, to which is added a description by courses and distances, and the latter on resurvey are found to exclude a part of the island, the whole island will pass by force of the first description.<sup>4</sup> An owner of land lying partly in lot number 10 and partly in lot number 9 conveyed a tract of land which he described in the deed as lot number 10, but bounded on all sides by the land of other persons.

<sup>1</sup> Crosby v. Bradbury, 20 Me. 61, and see cases cited therein.

<sup>2</sup> Eastman v. Knight, 35 N. H. 551, and cases cited.

<sup>3</sup> Drew v. Drew, 28 N. H. (8 Fost.) 489. This case is frequently cited as an authority, and is valuable for its examination and collection of authorities.

<sup>4</sup> Lodge's Lessee v. Lee, 6 Cranch, 237.

The court held that the whole tract lying in both lots was conveyed by the deed, although mistakes had been made as to the owners of the adjoining lots in the description.<sup>1</sup> The description in a deed was: "All that my farm of land in said Washington, on which I now dwell, being lot No. 17 in the first division of lands there, containing one hundred acres, with my dwelling-house and barn thereon standing, bounding west on land of Joseph Chaple, northerly by a pond, easterly by lot No. 18, and southerly by lot No. 19, having a highway through it." The fact was that the limits of the lot were correctly described, but the farm on which the grantor lived was not lot No. 17, but a different parcel of land. The court decided that this false particular of the description should be rejected, because the description was sufficiently definite without it, for, if considered as an essential part of the description, the effect would be to nullify the deed.<sup>2</sup>

**§ 1018. Subject continued.**—In designating a lot, the number of it was not given, but it was described as adjoining the land of four several individuals. But this description taken in full would include three several lots,

<sup>1</sup> *Tenny v. Beard*, 5 N. H. 58. Where a deed in the granting clause declared that the grantor "releases, quitclaims, and conveys" to the grantee, "and its successors and assigns forever, all his right, title, and interest of every name and nature, legal or equitable, in and to" the land, and in a subsequent clause, declares that "the interest and title intended to be conveyed by this deed is only that acquired by" the said grantor "by virtue of" a certain deed which had been previously executed to him, and conveying, it is assumed, only an undivided half of the land, the two clauses are inconsistent. The granting clause will prevail, and the whole interest of the grantor will pass by the deed: *Green Bay v. Hewett*, 55 Wis. 96; 42 Am. Rep. 701; 12 N. W. Rep. 382.

<sup>2</sup> *Worthington v. Hylyer*, 4 Mass. 196. The court said: "For by no construction can lot No. 17 be considered as conveyed, to the exclusion of the farm, as the lot is mentioned as descriptive of the farm, and not the farm as descriptive of the lot. Indeed, rather than the deed should be deemed void, a construction ought to be adopted, on which both the farm and the lot should be conveyed; for a farm on which the mortgagor then lived is certainly intended to be conveyed; and the lot is also bounded as descriptive of, and may therefore be considered as part of the premises."

and a quantity of land exceeding greatly that mentioned in the deed. If, however, one of the names of the persons should be rejected, one lot only would be definitely designated. Under these circumstances, it was evident that the statement that such person was an adjoining owner was a mistake, and, taking this view, the court decided that this part of the description should be rejected as such.<sup>1</sup> A description was: "All my real property, or homestead, so called, lying and being in Dartmouth, consisting of a dwelling-house and outbuildings, together with about thirty acres of land, let the same be more or less, with all the orchards, privileges, and appurtenances thereto belonging or any way appertaining—more particular boundaries, reference may be had to a deed given by Clark Ricketson to David Thatcher, of the above-mentioned premises." When the deed was executed, David Thatcher owned only a part of the land which he had purchased from Ricketson. He had, however, bought about as much from Leban Thatcher adjoining the land purchased by him, David, from Ricketson, and in fact, had about the same quantity of land altogether as he had purchased from the latter. The principal part of the land conveyed came from Ricketson, but by inadvertence the deed from Ricketson to David Thatcher was referred to for particular boundaries. But the grantee entered into possession of the whole, the part purchased by David Thatcher from Ricketson as well as the part purchased from Leban Thatcher. The reference to Ricketson's deed was held to be a mistake, and was rejected as an inadvertency in the description.<sup>2</sup> At the time the grantor executed a deed he had been in possession of and claimed to own several tracts of land adjoining each other. The whole aggregated about two hundred and eighty acres. His deed described the land conveyed as "a certain tract or parcel of land, situate in Falmouth, containing two hundred and thirty acres, more or less, all the lands

<sup>1</sup> *White v. Gay*, 9 N. H. 126; 31 Am. Dec. 224, and cases cited.

<sup>2</sup> *Thatcher v. Howland*, 2 Met. 41.

which I own in said town, the butts and bounds may be found in the county records of Portland." By an examination of the records it appeared that several different tracts of land adjoining each other had been conveyed to the grantor, and these, in the aggregate, contained two hundred and thirty-five acres. But in addition to these several tracts there was another adjoining them. To this latter parcel it did not appear that the grantor had any title apparent by the record, or any other than a title acquired by possession. But the whole of the land, including this latter tract, was held to pass by the description.<sup>1</sup> If the land is described as the whole of a certain farm, and is again described in the deed by courses and distances, which, however, do not embrace the whole farm, this latter description will be rejected, and the title to the whole farm will pass by the deed.<sup>2</sup> In another case, a person owned a farm, title to which he had acquired by two deeds, the first conveying to him an undivided one-third part, and the second the residue. He executed a mortgage deed of a piece of land, describing it as being the same land mentioned in his first deed, to which he referred, and as being his whole farm. The reference to the first deed was held to be intended for the description of the land only, and not as describing the quantity of estate or interest affected by the mortgage. In other words, the whole farm was considered to be embraced by the mortgage.<sup>3</sup> In a deed under which the grantor held, three adjoining parcels of land were conveyed, each of which was particularly described. He subsequently executed a deed, which commenced in the language of the former deed as a conveyance of three parcels, but it described only the first parcel, and referred to the deed from his grantor to himself. All three parcels, the court held, passed by the deed.<sup>4</sup>

<sup>1</sup> Field v. Huston, 21 Me. 69.

<sup>2</sup> Keith v. Reynolds, 3 Greenl. 393. And see Oate v. Thayer, 3 Greenl. 71.

<sup>3</sup> Willard v. Moulton, 4 Greenl. 14.

<sup>4</sup> Child v. Fickett, 4 Greenl. 472.

**§ 1019. Parcel of larger tract.**—A deed conveying a part of a larger tract of land, but not locating the part conveyed, is construed as conveying an undivided interest in the larger tract. If the deed, however, attempts to describe a specific portion, designating the number of acres, and describing it as a parcel of a larger tract, but the calls do not describe the tract of land intended to be conveyed, or any tract of land, the deed does not convey an interest in the whole tract, nor does it make the grantee a tenant in common in the larger tract with the grantor.<sup>1</sup> “Where a deed is of a given quantity of land, parcel of a larger tract, and the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on delivering the deed, becomes interested in all the lands embraced within the larger area as tenant in common with his grantor, and as such tenant the grantee can claim a partition under proceedings instituted for that purpose, or alternatively, a partition may be made by amicable agreement between the parties.”<sup>2</sup> Where the owners of a quarter section of land had conveyed twenty-two and twenty-nine hundredths acres taken from the southeasterly part of the quarter section, and subsequently executed a deed, describing the land conveyed as “the east one hundred acres of the quarter section, com-

<sup>1</sup> *Grogan v. Vache*, 45 Cal. 610; *Lawrence v. Ballou*, 37 Cal. 518; *Schenck v. Evoy*, 24 Cal. 104, 110.

<sup>2</sup> *Schenck v. Evoy*, 24 Cal. 110. The court quote this language with approval in *Lawrence v. Ballou*, 37 Cal. 518, 520, and say: “And in view of the nature of the present action, we add that if the grantor or his grantees exclude him from the possession, he may maintain ejectment against them. To the same effect, see, also, the following cases: *Lick v. O'Donnell*, 3 Cal. 59; 58 Am. Dec. 383; *Gibbs v. Swift*, 12 Cush. 393; *Sheafe v. Wait*, 30 Vt. 735; *Jackson v. Livingston*, 7 Wend. 136; *Corbin v. Jackson*, 14 Wend. 619; 28 Am. Dec. 550; *The Long Island R. R. Co. v. Conklin*, 29 N. Y. 572.”

But in *Grogan v. Vache*, 45 Cal. 610, 613, the court said that it could find no case in which a deed attempting to convey a parcel of a larger tract, but not describing the land intended to be conveyed so that it may be located, “is held to operate, by reason of such insufficient description of the specific tract, as a conveyance of an undivided interest in the larger tract; and, in our opinion, there is no rule for the construction of deeds which will work that result.”

mencing on the west bank of the Feather river, and running back to the westward far enough so as to contain one hundred acres of the quarter section, excepting therefrom a small piece of land," sold by the owners as stated, the court construed the deed as conveying only seventy-seven and seventy-one hundredths acres.<sup>1</sup>

§ 1020. **Reference to maps or other deeds.**—A deed, for a description of the land conveyed, may refer to another deed or to a map, and the deed or map to which reference is thus made is considered as incorporated in the deed itself.<sup>2</sup> Where the description is by courses and

<sup>1</sup> *Cox v. Hayes*, 64 Cal. 32.

<sup>2</sup> *Lippett v. Kelly*, 46 Vt. 516; *Powers v. Jackson*, 50 Cal. 429; *Vance v. Fore*, 24 Cal. 444; *Foss v. Crisp*, 20 Pick. 121; *Schenley v. Pittsburgh*, 104 Pa. St. 472; *City of Alton v. Illinois etc. Co.*, 12 Ill. 38; 52 Am. Dec. 479; *Waterman v. Andrews*, 14 R. I. 589; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66; *Rutherford v. Tracy*, 48 Mo. 325; 8 Am. Rep. 104; *Allen v. Taft*, 6 Gray, 552; *Hudson v. Irwin*, 50 Cal. 450; *St. Louis v. Wiggin's Ferry Co.*, 15 Mo. App. 227; *Boylston v. Carver*, 11 Mass. 515; *Dolde v. Vodka*, 49 Mo. 100; *Reed v. Lammel*, 28 Minn. 306; *Lunt v. Holland*, 14 Mass. 149; *Ferris v. Coover*, 10 Cal. 622; *Shirras v. Caig*, 7 Oranch, 48; *Davis v. Rainsford*, 17 Mass. 207; *Morgan v. Moore*, 3 Gray, 319; *Thomas v. Patten*, 13 Me. 329; *Kennebec Purchase v. Tiffany*, 1 Greenl. (1 Me.) 219; 10 Am. Dec. 60; *McDonald v. Lindall*, 3 Rawle, 496; *Farnsworth v. Taylor*, 9 Gray, 162; *Chamberlain v. Bradley*, 101 Mass. 191; 3 Am. Rep. 331; *Fox v. Union Sugar Co.*, 109 Mass. 292; *Stetson v. Dow*, 16 Gray, 374; *McCausland v. Fleming*, 63 Pa. St. 36; *Jenks v. Ward*, 4 Mich. 404; *Allen v. Bates*, 6 Pick. 460; *Knight v. Dyer*, 57 Me. 176; 99 Am. Dec. 765; *Perry v. Binney*, 103 Mass. 156. See *Read v. Cramer*, 1 Green Ch. 277; 34 Am. Dec. 204. And see, *Turnbull v. Schroeder*, 29 Minn. 49; *Lovejoy v. Lovett*, 124 Mass. 270; *Walker v. Boynton*, 120 Mass. 349; *Quinin v. Reimers*, 46 Mich. 605; *Auburn Church v. Walker*, 124 Mass. 69; *Boston Water Power Co. v. Boston*, 127 Mass. 374; *Billingsley v. Bates*, 30 Ala. 378; 68 Am. Dec. 126; *Union Railway & Transit Co. v. Skinner*, 9 Mo. App. 189; *Baxter v. Arnold*, 114 Mass. 577; *Twogood v. Hoyt*, 42 Mich. 609; *Olimer v. Wallace*, 28 Mo. 556; 75 Am. Dec. 135; *Jarstadt v. Morgan*, 48 Wis. 245; *Tate v. Gray*, 1 Swan, 73; *Van Blarcom v. Kip*, 2 Dutch. 351; *Montgomery v. Carlton*, 56 Tex. 431; *Caldwell v. Center*, 30 Cal. 543; 89 Am. Dec. 131; *Simmons v. Johnson*, 14 Wis. 526; *Whiting v. Dewey*, 15 Pick. 434; *Needham v. Judson*, 101 Mass. 161; *Chapman v. Pollack*, 70 Cal. 487; *Murray v. Klinzing*, 64 Conn. 78; *King v. Sears*, 91 Ga. 577; *City of St. Louis v. Railway Co.*, 114 Mo. 13; *Overand v. Menzzer*, 83 Tex. 112; *Plummer v. Gould*, 92 Mich. 1; 31 Am. St. Rep. 567; *Rupert v. Penner*, 35 Neb. 587; *Campbell v. Morgan*, 22 N. Y. Supp. 1001; *Whitehead v. Ragan*, 106 Mo. 231; *Young v. Cosgrove*, 83 Iowa,

monuments and boundary lines of other tracts of land, and then the deed declares that the description already made is to be according to a survey previously made by a certain person, the survey by such reference is incorporated into the deed. The title of the grantee extends only to the land contained within the exterior lines of such survey.<sup>1</sup> Where a recorded plat shows the existence of a street or alley, and land is conveyed by reference to such plat, a street or alley is necessarily excluded from the deed. The grantee is charged with notice of the streets and alleys shown by the map.<sup>2</sup> If the deed refers to a plat, containing upon its face that to which the expressions contained in the deed may be applied, the court will not reject the words of the deed, if it can connect the deed and plat in construction.<sup>3</sup> Where a question arises as to the true location of the boundary line between two town lots, if the lots are described by numbers only, it may be that the boundary recognized by actual use and occupation is the one intended. But when the lots are referred to "as known and designated in the plan" of the town, and the plan contains a specific description of the lots, the deed has the same effect as if the description contained in the plan were incorporated in the deed, and it cannot be shown by parol that the intention was that the boundaries should be different.<sup>4</sup> The deed referred

682; *O'Herrin v. Brooks*, 67 Miss. 266; 6 So. Rep. 844; *Heffelman v. Otsego Water Co.*, 78 Mich. 121; 43 N. W. Rep. 1096; *Marvin v. Elliott*, 99 Mo. 616; *Miller v. Topeka Land Co.*, 44 Kan. 354; 24 Pac. Rep. 420; *Prentice v. Northern Pac. R. R. Co.*, 154 U. S. 163; *Winnipisiogee Paper Co. v. New Hampshire Land Co.*, 59 Fed. Rep. 542; *Sanborn v. Mueller*, 38 Minn. 27; 35 N. W. Rep. 686; *Wright v. Lassiter*, 71 Tex. 640; *Sink v. McManus*, 49 Hun, 593; *Midyett v. Wharton*, 102 N. C. 14; *Redd v. Murry*, 95 Cal. 48; *Bohrer v. Lange*, 44 Minn. 281; *Masterson v. Munro*, 105 Cal. 431; 45 Am. St. Rep. 57; *Payne v. English*, 79 Cal. 540.

<sup>1</sup> *Hudson v. Irwin*, 50 Cal. 450. A description of a block of land by a number according to the official map will prevail over a description of the block by metes and bounds if there be a conflict: *Masterson v. Munro*, 105 Cal. 431; 45 Am. St. Rep. 57.

<sup>2</sup> *Burbach v. Schweinler*, 56 Wis. 386.

<sup>3</sup> *City of Alton v. Illinois Transp. Co.*, 12 Ill. 38; 52 Am. Dec. 479.

<sup>4</sup> *Davidson v. Arledge*, 88 N. C. 326.



to and the deed so referring, when taken together, must be certain in description as to the land intended to be conveyed.<sup>1</sup> When land is described by reference to certain degrees of latitude and also to a certain map, the degrees of latitude, in case of a conflict between the two descriptions, will be rejected, as being less certain than the map.<sup>2</sup> If the description of the deed referred to is otherwise sufficient, the fact that such deed is not recorded in the county in which it is said to be recorded, is immaterial.<sup>3</sup> Where the land conveyed is described by lot and block, with an additional description by metes and bounds, containing a less quantity of land than the lot, the intention of the grantor is to convey the whole lot.<sup>4</sup> And where the land is described as that conveyed to the grantor by another deed, to which reference is made for a particular description, the grantee will not obtain title to a lot excepted from the deed thus referred to, notwithstanding that the grantor, at the time of the execution of the latter deed, had title to the excepted lot.<sup>5</sup> It does not necessarily follow that a particular description in a deed is to be enlarged by a succeeding general description, by way of reference to and adoption of the description contained in a former deed.<sup>6</sup> A deed containing a description, and referring to a map having lines drawn upon it, and marking the natural boundaries and the natural objects delineated upon its surface, should be considered as giving the true description of the land, as much as if the

<sup>1</sup> *Caldwell v. Center*, 30 Cal. 539; 89 Am. Dec. 131.

<sup>2</sup> *Mayo v. Mazeaux*, 38 Cal. 442. See, also, *Poorman v. Miller*, 44 Cal. 269.

<sup>3</sup> *Saunders v. Schmaelzle*, 49 Cal. 59.

<sup>4</sup> *Rutherford v. Tracy*, 48 Mo. 325; 8 Am. Rep. 104. A subsequent conveyance by a grantor of streets or alleys laid out on a map and dedicated to public use is void: *Moose v. Carson*, 104 N. C. 431; 17 Am. St. Rep. 681.

<sup>5</sup> *Getchell v. Whittemore*, 72 Me. 393.

<sup>6</sup> *Brunswick Savings Institution v. Crossman*, 76 Me. 577; *Lovejoy v. Lovett*, 124 Mass. 270. A map pasted by the recorder at a particular page of the record is sufficiently identified by a deed which refers to it as "recorded" in such a book and page: *McCullough v. Olds*, 108 Cal. 529.

map were marked down in the deed.<sup>1</sup> If any competent surveyor can locate the land and ascertain the dimensions of the various parcels, the map is sufficient.<sup>2</sup> But a surveyor must have data, and cannot determine lines and fix monuments according to his own ideas.<sup>3</sup> For the purpose of showing lines and boundaries, it can always be proven where the survey actually ran.<sup>4</sup>

§ 1020 a. **Conflict between map and survey.**—Where a deed describing the land conveyed refers to a map and also to the survey upon which the map is based, the map, in the absence of evidence to the contrary, will be presumed correctly to represent the survey, and it is unnecessary to look to the latter. But if, instead of agreeing, there are discrepancies between them, the survey must prevail.<sup>5</sup> In an early case in New York, a tract of land which was granted by the commissioners of the land-office to several persons, with a description by its exterior boundaries alone, was directed to be surveyed by the surveyor general, and patents were directed to be issued for the several lots according to the return and map of such survey. The patents described the lots by reference to the map, but it was held that the patents were to be understood as referring to the field-book and actual survey as well as to the map on file. It was also held that the owners were bound by their several locations as they appeared by the lines on the ground, although it might be that some of the lots would exceed, and others would not equal, the quantity of acres mentioned in the patents.<sup>6</sup> Where a deed refers to a map as an official map for a further description, and the map purports on its face to be “laid out” by an individual, these words are equivalent to “as

<sup>1</sup> *Chapman v. Polack*, 70 Cal. 487.

<sup>2</sup> *Village of Auburn v. Goodwin*, 123 Ill. 58.

<sup>3</sup> *Jones v. Lee*, 77 Mich. 37; *Fisher v. Dowling*, 66 Mich. 370.

<sup>4</sup> *Euliss v. McAdams*, 108 N. C. 507.

<sup>5</sup> *Whiting v. Gardner*, 80 Cal. 79; *O'Farrell v. Harney*, 51 Cal. 125; *Penry v. Richards*, 52 Cal. 496.

<sup>6</sup> *Jackson v. Freer*, 17 Johns. 30. See, also, *Jackson v. Cole*, 16 Johns. 256.

surveyed" by such individual, and include a reference to the monuments erected by the surveyor. The deed is to be construed as referring to such monuments, and such monuments, in case of a discrepancy, will control the courses and distances laid down on the map.<sup>1</sup> The fact that a deed of a lot in a town refers to the official map of the town-plat for a description does not preclude the introduction of parol evidence to show that the survey in the field, from which the map was made, conflicts with the map. If the points and lines established by the survey can be proved, the survey must prevail over the map in arriving at the correct boundary of the lot.<sup>2</sup>

§ 1021. **Loss of plat.**—The loss of a plat referred to in a deed, rendering it difficult to ascertain the boundaries of the land conveyed, does not avoid the deed.<sup>3</sup> The plan is a part of the deed, and is to be so construed when attempted to be controlled by the general language of the deed calling for natural monuments and boundaries.<sup>4</sup> If in an action of ejectment both parties claim under deeds which refer to a recorded town-plat, for the purpose of identifying the lot, the record, notwithstanding that the plat may not have been made in conformity with law, is proper evidence.<sup>5</sup>

§ 1022. **Parol evidence as to plat.**—Where a plat is referred to as annexed to a deed, although it may have become separated from the deed, yet it may, when it is admitted or shown that it is the same plat referred to, be received in evidence.<sup>6</sup> If the land is described as a lot of

<sup>1</sup> Penry v. Richards, 52 Cal. 496.

<sup>2</sup> O'Farrell v. Harney, 51 Cal. 125. See, also, Chenoweth v. Haskell's Lessees, 3 Pet. 93.

<sup>3</sup> New Hampshire Land Co. v. Tilton, 19 Fed. Rep. 73.

<sup>4</sup> Schenley v. Pittsburgh, 104 Pa. St. 472. The fact that the recorder indorses on the map a later survey of a part of the land delineated on it will not destroy its identity with the map referred to in the deed: McCullough v. Olds, 108 Cal. 529.

<sup>5</sup> Burk v. Andis, 98 Ind. 59.

<sup>6</sup> McCullough v. Wall, 4 Rich. 68; 53 Am. Dec. 715.

land in a town "known and described on the official map of said town as block No. 6," parol evidence is admissible to identify the map, and, when so identified, the map forms a portion of the deed.<sup>1</sup> The words on the face of a map of a town, "as laid out" by a certain person, are equivalent to "as surveyed" by him, and embrace a reference to the monuments placed on the land by the surveyor. If such map is referred to in a deed as a part of the description, the deed is to be construed as referring to such monuments, and they, rather than the courses and distances laid down on the map, will govern.<sup>2</sup> If a lot in a town is conveyed by a description which refers to the official map of the town plat, this reference does not prevent the reception of parol evidence for the purpose of showing a conflict between the survey in the field from which the map was made and the map itself, if the object is to determine the correct boundary of the lot.<sup>3</sup> The plan referred to in a deed in legal construction becomes a part of the deed. It is not subject to other explanations by extraneous evidence to any greater extent than it would be if all the particulars of the description had been set out at

<sup>1</sup> Penry v. Richards, 52 Cal. 496.

<sup>2</sup> Penry v. Richards, 52 Cal. 496. See Pettigrew v. Dobbelaar, 63 Cal. 396.

<sup>3</sup> O'Farrell v. Harney, 51 Cal. 125. Said the court: "The question is, where are the boundaries of the lot conveyed by Taylor to Moran? The map was intended as a representation of the survey actually made on the ground, the position of the blocks and lots as indicated by the lines as run and the stakes driven at the corners. A map which by reference to monuments established, or by some other mode, refers to a survey, is presumed to correctly represent the survey as actually made; but if there is a discrepancy between the map and the survey, the survey must prevail, if the position of the points and lines established by the survey can be proved. It must be so held upon the principle that the monuments, whether natural or artificial, must prevail over the courses and distances. But it is urged that the official map does not mention a stake at the northwest corner of block 13, and that the admission of evidence showing that such a stake had been set at the first survey, is in violation of the rule which prohibits the admission of parol evidence to vary, add to, or contradict a deed. The objection is not tenable. The map was intended, as has already been said, as a representation of the actual survey, and the evidence only proves the position of the lines as run—locates the calls mentioned in the map."

length in the body of the deed.<sup>1</sup> Where a deed conveying a mill and dam with water privilege refers to another deed for a specification of the privilege, the privilege conveyed must be measured by such deed, and not by the use that the grantor is actually making of the water at the time at which the conveyance is executed.<sup>2</sup> If a town has by ordinance declared a certain map to be the official map, deeds made after such declaration, and referring to the official map, refer to such map.<sup>3</sup>

§ 1023. **Right to way.**—If one of the boundaries of the description is a private way not defined in the deed, but shown upon a plan which is referred to in the deed, and which is recorded in the registry of deeds, the grantor is estopped from denying the existence of that right of way. He is also estopped from denying the existence of any connecting ways shown on the plan, enabling the grantor to reach public ways in any direction so far as the title of the grantor may extend.<sup>4</sup> So if the way is shown on the plan referred to in the deed, and the plan is afterward recorded by the grantor in the registry of deeds, he and those claiming under him are estopped from obstructing the way opposite the land granted and within its side lines, if produced at right angles to the course of the way.<sup>5</sup> A court called "Central Court" was laid out over the land, and the owner laid out house lots on the court, and erected a house on each of two adjoining lots. He afterward conveyed one of these, the description in the deed being "a brick house, and the land under and adjoining the same, being No. 4 in Central Court," and according to the reporter was thus bounded: "Beginning in front of said house, at the center of the brick partition wall between this and the adjoining house, and running easterly on a line with the center of said wall, etc.,

<sup>1</sup> *Proprietors of Kennebec Purchase v. Tiffany*, 1 Greenl. 219; 10 Am. Dec. 60.

<sup>2</sup> *Perry v. Binney*, 103 Mass. 156.

<sup>3</sup> *Penry v. Richards*, 52 Cal. 496.

<sup>4</sup> *Fox v. Union Sugar Refinery*, 109 Mass. 292.

<sup>5</sup> *Rogers v. Parker*, 9 Gray, 445.

about 80 feet 9 inches, then turning and running northerly to land of Salisbury, about 27 feet 6 inches, then turning and running westerly, bounded northerly on Salisbury's land, until it comes on a line with the front of said house, about 85 feet 5 inches, then turning and running southerly on a line with the front of said house about 27 feet 2 inches, until it comes to the center of the brick partition wall first mentioned, together with the land in front of said house, under the stone steps; with a right to pass and repass on foot, and with horses and carriages, to said house and land through said Central Court at all times, said Homes to pay one-half the expense of keeping the well in good order, and the expense of keeping the sidewalk in front of said house in good repair." At the time at which the deed was made the sidewalk was paved with brick, the shed of the other house of the grantor forming one side of it, the shed, however, having no door opening upon it. There was a strip of land at the northerly side of the lot conveyed. This strip was not covered by the grantee's house, but was used as a passage from which a gate opened upon the sidewalk, connecting the kitchen and backyard with Central Court over the sidewalk, and there was also another gate opening upon the sidewalk from under the front steps of the sidewalk. It was impossible to gain access to either of the gates without passing over some part of the sidewalk. The court held that whether the sidewalk was or was not a part of Central Court, the grantee was entitled to a right of way over it. The way granted was to be considered as limited and defined by the grantee's house on one side and the grantor's shed on the other, and not merely as a convenient way to be some time afterward defined.<sup>1</sup>

<sup>1</sup> *Salisbury v. Andrews*, 19 Pick. 250. And see, also, relating to rights of way, *Stetson v. Dow*, 16 Gray, 372; *Atkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100; *Thomas v. Poole*, 7 Gray, 83. See, also, *Parker v. Bennett*, 11 Allen, 388; *Morgan v. Moore*, 3 Gray, 319; *Lunt v. Holland*, 14 Mass. 149; *Murdock v. Chapman*, 9 Gray, 156; *Davis v. Rainsford*, 17 Mass. 207.

§ 1024. **Land bounded by non-navigable stream or highway.**—Unless the deed manifests an intention on the part of the grantor to limit the boundary line, the line, when the land is bounded by a non-navigable stream or highway, extends to the center of such stream or highway, if the grantor is the owner of the fee.<sup>1</sup> Hence, where

<sup>1</sup> *Dean v. Lowell*, 135 Mass. 55; *Pike v. Munroe*, 36 Me. 309; 58 Am. Dec. 751; *White v. Godfrey*, 97 Mass. 472; *Kittle v. Pfeiffer*, 22 Cal. 484; *Demeyer v. Legg*, 18 Barb. 14; *Webber v. Cal. & O. R. R. Co.*, 51 Cal. 425; *Nichols v. Suncook Mfg. Co.*, 34 N. H. 345; *Berridge v. Ward*, 10 Com. B., N. S., 400; *Mott v. Mott*, 68 N. Y. 246; *Helmer v. Castle*, 109 Ill. 664; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Transue v. Sell*, 105 Pa. St. 604, and cases cited; *Champlin etc. R. R. v. Valentine*, 19 Barb. 484; *Hoff v. Tobey*, 66 Barb. 347; *Salter v. Jonas*, 39 N. J. L. 469; 23 Am. Rep. 229; *Norris v. Hill*, 1 Mann. (Mich.) 202; *Winter v. Peterson*, 4 Zab. 524; 61 Am. Dec. 678; *Banks v. Ogden*, 2 Wall. 57; *Moody v. Palmer*, 50 Cal. 31; *Kingsland v. Chittenden*, 6 Lans. 15; *Watson v. Peters*, 26 Mich. 508; *Maynard v. Weeks*, 41 Vt. 617; *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413; *Newhall v. Ireson*, 8 Cush. 597; 54 Am. Dec. 790; *Johnson v. Anderson*, 18 Me. 76; *Dubuque v. Maloney*, 9 Iowa, 451; 74 Am. Dec. 358; *Stark v. Coffin*, 105 Mass. 328; *Gove v. White*, 20 Wis. 432; *Gear v. Barnum*, 37 Conn. 229; *Hawesville v. Lander*, 8 Bush, 679; *Sutherland v. Jackson*, 32 Me. 80; *Motley v. Sargent*, 119 Mass. 231. And see, also, bearing on the same proposition, *Ohild v. Starr*, 4 Hill. 369, 373; *Hollenbeck v. Rowley*, 8 Allen, 473; *Codman v. Evans*, 1 Allen, 443; *Chatham v. Brainerd*, 11 Conn. 60; *Lord v. Commrs. of Sidney*, 12 Moore P. C. C. 497; *Jackson v. Hathaway*, 15 Johns. 454; 8 Am. Dec. 263; *Read v. Leeds*, 19 Conn. 182, 187; *Richardson v. Vermont etc. R. R.*, 25 Vt. 472; 60 Am. Dec. 283; *Tousley v. Galena etc. Mining Co.*, 24 Kan. 328; *Milhau v. Sharp*, 27 N. Y. 611, 624; 84 Am. Dec. 314; *Regina v. Board of Works*, 4 Best & Smith, 526; *Bissell v. N. Y. Cent. R. R.*, 26 Barb. 630; *Morrison v. Willard*, 30 Vt. 118; *Kimball v. City of Kenosha*, 4 Wis. 331; *Cox v. Freedley*, 33 Pa. St. 124; 75 Am. Dec. 584; *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649; *Harris v. Elliot*, 10 Peters, 53; *Steel v. Prickett*, 2 Stark. 463; *Fisher v. Smith*, 9 Gray, 441; *Canal Trustees v. Havens*, 11 Ill. 557; *O'Linda v. Lothrop*, 21 Pick. 292; *Witter v. Harvey*, 1 McCord, 67; 10 Am. Dec. 650; *Parker v. Framingham*, 8 Met. 260, 267; *Grose v. West*, 7 Taunt. 39; *Trustees v. Lander*, 8 Bush, 679; *Falls v. Reis*, 74 Pa. St. 439; *Smith v. Howdon*, 14 Com. B., N. S., 398; *Lewis v. Beattie*, 105 Mass. 410; *Fisher v. Smith*, 9 Gray, 444; *Winslow v. King*, 14 Gray, 323; *Boston v. Richardson*, 13 Allen, 154; *Sleeper v. Laconia*, 60 N. H. 202; 49 Am. Rep. 311, and cases cited; *Claremont v. Carlton*, 2 N. H. 369; 9 Am. Dec. 88. The batture or alluvion rights to the river frontage will pass by a deed describing the land as fronting on a certain street and extending between specified lines to the river, without any provision to that effect: *Meyers v. Mathis*, 42 La. Ann. 471; 21 Am. St. Rep. 385.



a deed describes the land conveyed as extending five hundred feet to a street or avenue, and thence at right angles along the street one hundred and twenty feet to the place of beginning, the fee of the land to the center of the street is conveyed subject to the public easement, notwithstanding the line of five hundred feet extends only to the side of the street and not to its center. When the avenue is no longer used as a street, the land is freed from the easement.<sup>1</sup> But if the land is described by metes and bounds, without any reference to a street, the grantee acquires no title to the fee of an adjacent street which the grantor subsequently dedicated to the public.<sup>2</sup> If, however, lots are sold after the projection of, but before the opening of a public street, and the deeds describe the lots as running to and being bounded by the line of the street, the fee to the center of the street passes, and the grantees are entitled to damages upon the opening of the street.<sup>3</sup> And where land is laid out into blocks and lots, which are bounded by what are represented on an unrecorded or defective plat as streets, a deed referring to the plat for a true description of the premises passes to the grantee, as against the grantor and his assigns, the fee to the center of the street upon which the lot conveyed abuts.<sup>4</sup> Where the

<sup>1</sup> *Moody v. Palmer*, 50 Cal. 31. See *Webber v. California etc. R. R. Co.*, 51 Cal. 425.

<sup>2</sup> *Knott v. Jefferson Street Ferry Co.*, 9 Or. 530.

<sup>3</sup> *Easton Burrough's Appeal*, 81 \*Pa. St. 85.

<sup>4</sup> *Jarstadt v. Morgan*, 48 Wis. 245. For other cases upon the construction of deeds in which one of the boundaries is a stream, see *Nickerson v. Crawford*, 16 Me. 245; *Bishop v. Seeley*, 18 Conn. 393; *Agawam Canal Co. v. Edwards*, 36 Conn. 476; *Hatch v. Dwight*, 17 Mass. 289; 9 Am. Dec. 145; *Doddridge v. Thompson*, 9 Wheat. 470; *Granger v. Avery*, 64 Me. 292; *Coover v. O'Conner*, 8 Watts, 470; *Herring v. Fisher*, 1 Sand. 344; *Hammond v. McLachlan*, 1 Sand. 323; *Stone v. Augusta*, 46 Me. 127; *Watson v. Peters*, 26 Mich. 508; *Gavit v. Chambers*, 3 Ohio, 495; *Beahan v. Stapleton*, 13 Gray, 427; *Coldspring Iron Works v. Tolland*, 9 Cush. 495; *Knight v. Wilder*, 2 Cush. 199; 48 Am. Dec. 660; *Robinson v. White*, 42 Me. 209. Between grantor and grantee, a deed of a lot of land bounded on a street in a city carries the land to the center of the street. The deed will have this effect although it does not refer to the street, but the lot is described by a number as represented upon a map, showing it as abutting on the street, and the bounds as given do

land conveyed lies east of a certain street, and the deed explicitly describes the land as bounded by the east line of the street, the title to the soil in the street does not

not include any portion of the street: *Hennessey v. Murdock*, 137 N. Y. 317; 33 N. E. Rep. 330. Mr. Justice Maynard says there is no distinction in this respect between the streets of a city and country highways, and continues: "This construction has so long prevailed that it has become a rule of property, and it is founded upon the presumed intent of the parties to the conveyance. It is not reasonable to infer that the grantor intended to reserve the title to the fee of the narrow strip lying between the physical boundaries of the lot conveyed and the center of the street, or that the grantee understood that any such reservation had been made. The use of the fee of the bed of the street is so inseparably connected with the ordinary use of the adjacent lot, that a severance of the two will not be deemed to have been effected, unless the presumption that the grantor intended to pass title to the center of the street is rebutted by other parts of the deed, and by the condition and relation of the parties to the lands conveyed and other lands in the vicinity": *Hennessey v. Murdock*, 137 N. Y. 317; 33 N. E. Rep. 330. See, also, to the same effect, *Dunham v. Williams*, 37 N. Y. 251; *Mott v. Mott*, 68 N. Y. 246; *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Perrin v. Laine*, 36 N. Y. 120; *In re Ladue*, 118 N. Y. 220; 23 N. E. Rep. 465; *Haberman v. Baker*, 128 N. Y. 259; *City of Buffalo v. Pratt*, 131 N. Y. 298; 27 Am. St. Rep. 592; *Jackson v. Hathaway*, 15 Johns. 447; 8 Am. Dec. 263; *Greer v. N. Y. C. & H. R. R. Co.*, 37 Hun, 346; *Wallace v. Fee*, 50 N. Y. 694; *Pollock v. Morris*, 19 J. & S. 112; *Hammond v. McLachlan*, 1 Sand. 323; *Cochran v. Smith*, 73 Hun, 597; *Holloway v. Southmayd*, 139 N. Y. 390; 34 N. E. Rep. 1047; *Wager v. Troy etc. R. Co.*, 25 N. Y. 526; *Story v. N. Y. Elevated R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Mott v. Mott*, 68 N. Y. 246; *Lozier v. N. Y. Cent. R. Co.*, 42 Barb. 465; *Sherman v. McKeon*, 38 N. Y. 266; *White's Bank v. Nichols*, 64 N. Y. 65; *Jackson v. Louw*, 12 Johns. 252; *Watkins v. Lynch*, 71 Cal. 21; *Fraser v. Ott*, 95 Cal. 661; 30 Pac. Rep. 793; *Moody v. Palmer*, 50 Cal. 31; *Webber v. Cal. & O. R. R. Co.*, 51 Cal. 425; *Oxton v. Graves*, 68 Me. 371; 28 Am. Rep. 75; *Sutherland v. Jackson*, 32 Me. 80; *Low v. Tibbetts*, 72 Me. 92; 39 Am. Rep. 303; *Cottle v. Young*, 59 Me. 105; *Bucknam v. Bucknam*, 12 Me. 463; *Johnson v. Anderson*, 18 Me. 76; *Canal Trustees v. Haven*, 11 Ill. 554; *Helmer v. Castle*, 109 Ill. 664; *Henderson v. Hatterman*, 146 Ill. 555; 34 N. E. Rep. 1041; *Banks v. Ogden*, 2 Wall. 57; *Jacksonville etc. Ry. Co. v. Lockwood*, 33 Fla. 573; 15 So. Rep. 327; *Gove v. White*, 20 Wis. 425; *Milwaukee v. Milwaukee & Beloit R. R. Co.*, 7 Wis. 85; *Kimball v. Kenosha*, 4 Wis. 321; *Jarstadt v. Morgan*, 48 Wis. 245; 4 N. W. Rep. 27; *Andrews v. Youmans*, 78 Wis. 56; 47 N. W. Rep. 304; *Woodman v. Spencer*, 54 N. H. 507; *Reed's Petition*, 13 N. H. 381; *McShane v. Main*, 62 N. H. 4; *Marsh v. Burt*, 34 Vt. 289; *Ott v. Kreiter*, 110 Pa. St. 370; *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413; *Healey v. Babbitt*, 14 R. I. 533; *Maynard v. Weeks*, 41 Vt. 617; *Church v. Stiles*, 59 Vt. 462; 10 Atl. Rep. 674; *Purkiss v. Benson*, 28 Mich. 538; *Cox v.*

pass.<sup>1</sup> But where a purchaser agrees to buy land at a certain price per acre after the making of a survey, and a street or highway is mentioned as one of the boundaries, he is compelled to pay for the land to the middle of the street, where no contrary intention appears.<sup>2</sup>

**§ 1025. Where contrary intention appears.**—The rule given in the preceding section is one of construction only, and, of course, does not govern when it appears upon the face of the deed that the intention was that the grantee should take to the line of the street or stream, and not to

Freedley, 33 Pa. St. 124; 75 Am. Dec. 584; *Trutt v. Spotts*, 87 Pa. St. 339; *Transue v. Sell*, 105 Pa. St. 604; *Firmstone v. Spaeter*, 150 Pa. St. 616; 30 Am. St. Rep. 851; 25 Atl. Rep. 41; *Spackman v. Steidel*, 88 Pa. St. 453; *Dobson v. Hohenadel*, 148 Pa. St. 367; 23 Atl. Rep. 1128; *Taylor v. Armstrong*, 24 Ark. 102; *Montgomery v. Hines*, 134 Ind. 221; 33 N. E. Rep. 1100; *Cox v. Louisville N. A. & C. R. R. Co.*, 48 Ind. 178; *Hamilton Co. v. Indianapolis Natural Gas Co.*, 134 Ind. 209; *Warbritton v. Demorett*, 129 Ind. 346; 27 N. E. Rep. 730; *Terre Haute etc. R. Co. v. Scott*, 74 Ind. 29; *Haslett v. New Albany etc. R. Co.*, 7 Ind. App. 603; 34 N. E. Rep. 845; *Herbert v. Rainey*, 54 Fed. Rep. 248; *Peabody Heights Co. v. Sadtler*, 63 Md. 533; 52 Am. Rep. 519; *Terre Haute etc. R. Co. v. Rodel*, 89 Ind. 128; 46 Am. Rep. 164; *Baltimore etc. R. R. Co. v. Gould*, 67 Md. 60; *Columbus & W. Ry. Co. v. Witherow*, 82 Ala. 190; 3 So. Rep. 23; *Moore v. Johnston*, 87 Ala. 220; 6 So. Rep. 50; *Chatham v. Brainerd*, 11 Conn. 60; *Champlin v. Pendleton*, 13 Conn. 23; *Peck v. Smith*, 1 Conn. 103; 6 Am. Dec. 216; *Watrous v. Southworth*, 5 Conn. 305; *Gear v. Barnum*, 37 Conn. 229; *Silvey v. McCool*, 86 Ga. 1; 12 S. E. Rep. 175; *Tousley v. Galena M. & S. Co.*, 24 Kan. 328; *Hunt v. Brown*, 75 Md. 481; *Albert v. Thomas*, 73 Md. 181; *Ellsworth v. Lord*, 40 Minn. 337; 42 N. W. Rep. 389; *Rich v. City of Indianapolis*, 37 Minn. 423; 5 Am. St. Rep. 861; 35 N. W. Rep. 2; *In re Robbins*, 34 Minn. 99; 57 Am. Rep. 40; *Jacob v. Woolfolk*, 90 Ky. 426; 14 S. W. Rep. 415; *Hawesville v. Lander*, 8 Bush, 679; *Salter v. Jonas*, 39 N. J. L. 469; 23 Am. Rep. 229; *Ayres v. Penn. Ry. Co.*, 52 N. J. L. 405; *Dodge v. Penn. Ry.*, 43 N. J. Eq. 351.

<sup>1</sup> *Grand Rapids & Ind. R. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 306.

<sup>2</sup> *Firmstone v. Spaeter*, 150 Pa. St. 616; 30 Am. St. Rep. 851. If the grantor owns the fee of the soil of the highway, the presumption is that his deed carries the fee: *Haberman v. Baker*, 128 N. Y. 253. That it will be presumed that a deed conveying land bounded by a street will carry the fee to the center, see *Silvey v. McCool*, 86 Ga. 1; *Florida etc. Ry. Co. v. Brown*, 23 Fla. 104; *Matter of Ladue*, 118 N. Y. 213; *Low v. Tibbetts*, 72 Me. 92; 39 Am. Rep. 303; *Warbritton v. Demorett*, 129 Ind. 346; *Salter v. Jonas*, 39 N. J. L. 469; 23 Am. Rep. 229.

its center. Thus, where one line of the description is "thence *along the easterly line*" of a certain street, a certain distance, and no other language is employed to modify the boundary, the grantee's title does not extend to the center of the street.<sup>1</sup> And where land adjacent to a road is conveyed by a description beginning "at the corner formed by the intersection of the easterly line" of the road with the northerly line of another road, and ending "thence along the easterly line" of the road to which the land was adjacent, the land conveyed is not bounded by the center of the road, but by its side.<sup>2</sup> But the mere fact that a monument on the side of the road or on the bank of a stream is mentioned as the place of the beginning or end of a line, is not of itself sufficient to rebut the presumption that the grantee takes to the center of the road or to the thread of the stream.<sup>3</sup> The intention may be gathered from the language of the description, as noticed in the preceding section, where the land conveyed is bounded by the line of the street instead of the street itself.<sup>4</sup>

**§ 1026. Land bounded by lake or pond.**—If the land is bounded by a natural lake or pond, the grantee's title extends to low-water mark.<sup>5</sup> But if the land is bounded

<sup>1</sup> *Severy v. Central Pacific R. R. Co.*, 51 Cal. 194.

<sup>2</sup> *Mead v. Riley*, 50 N. Y. Sup. Ct. 20. And see *Lough v. Machlin*, 40 Ohio St. 332; *Tag v. Keteltas*, 48 N. Y. Sup. Ct. 241; *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287; 41 Am. Rep. 361; *Cottle v. Young*, 59 Me. 105; *O'Connell v. Bryant*, 121 Mass. 557; *Lee v. Lee*, 27 Hun, 1; *Peck v. Denniston*, 121 Mass. 17; *Murphy v. Copeland*, 51 Iowa, 515; *Babcock v. Utter*, 1 Abb. N. Y. App. 27; *DePeyster v. Mali*, 27 Hun, 439; *Keening v. Ayling*, 126 Mass. 404; *Smith v. Slocomb*, 9 Gray, 36; 69 Am. Dec. 274; *Brainerd v. Boston etc. R. R.*, 12 Gray, 407, 410; *Hanson v. Campbell*, 20 Md. 223; *Perrin v. New York Cent. R. R.*, 40 Barb. 65.

<sup>3</sup> *Low v. Tibbetts*, 72 Me. 92; 39 Am. Rep. 303. And see *Bradford v. Cressey*, 45 Me. 9; *Pollock v. Morris*, 51 N. Y. Sup. Ct. (10 Jones & S.) 112.

<sup>4</sup> *Grand Rapids & Ind. R. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 306.

<sup>5</sup> *King v. Young*, 76 Me. 76; 49 Am. Rep. 596; *Wheeler v. Spinola*, 54 N. Y. 377; *West Roxbury v. Stoddard*, 7 Allen, 167; *Stephens v. King*, 76 Me. 197. See *Seaman v. Smith*, 24 Ill. 521; *Bradley v. Rice*,

by an artificial pond, the grantee's title extends to the middle of the pond.<sup>1</sup> A deed described the land as bounded on a certain pond. It appeared, however, upon applying the deed to the local objects embraced within the description that the pond was a natural one, which was raised to various heights at different times by means of a dam existing and in use at the time of the execution of the deed. The court held that there was a latent ambiguity in the deed, and that it was competent to show by parol evidence that at the time of the execution of the deed a certain line was agreed upon and understood to be the boundary of the pond.<sup>2</sup>

13 Me. 198; 29 Am. Dec. 501; Canal Commissioners v. The People, 5 Wend. 423; Champlin etc. R. R. Co. v. Valentine, 19 Barb. 484; Austin v. Rutland R. R. Co., 45 Vt. 215; Hathorne v. Stinson, 12 Me. 183; 28 Am. Dec. 167. When land is bounded by a river, a description will be construed as though the grantor did not intend to retain a mere narrow strip between the land conveyed and his boundary line, where there was in the deed no express provision to that effect, and especially when it would deprive the grantee of valuable water privileges: Brown Oil Co. v. Caldwell, 35 W. Va. 95; 29 Am. St. Rep. 793.

<sup>1</sup> Hathorne v. Stinson, 1 Fairf. 238; 25 Am. Dec. 228; State v. Gilman, 9 N. H. 461. See Lowell v. Robinson, 16 Me. 357; 33 Am. Dec. 671; Smith v. Miller, 5 Mason, 196; Mansur v. Blake, 62 Me. 38; Robinson v. White, 42 Me. 209; Cook v. McClure, 58 N. Y. 437; 17 Am. Rep. 270; Wood v. Kelley, 30 Me. 55; Phinney v. Watts, 9 Gray, 269; 69 Am. Dec. 288; Ledyard v. Ten Eyck, 36 Barb. 102; Fletcher v. Phelps, 28 Vt. 257.

<sup>2</sup> Waterman v. Johnson, 13 Pick. 261. The opinion was delivered by Chief Justice Shaw, who said: "The rule is clear, that where the parties make any definite agreement in their deed, such agreement will control any legal implication. But where general terms are used in a description, the court will put a construction upon those terms, where any definite rule has been established, and, in such case, parol evidence will not be admissible to control the legal effect of such description, any more than to control the plain meaning or legal effect of any clause or stipulation contained in a deed. As where the deed bounds the premises upon the sea or salt water, the legal effect is to give a title to the soil, subject to certain limitations, to low-water mark, such being the legal construction put upon this description by the colony ordinance and by usage. So if the premises conveyed are bounded on a river not navigable, the grant extends, by legal operation, to the *filum aquæ* or thread of the river, though in both these cases the parties, if they think fit, may limit their grants by definite language, so as to give them a different operation, and thus exclude the flats or the bed of the river

§ 1026 a. **Effect of meander lines.**—The object of a meander line is to show the general course of the stream, and is not to be construed as limiting the boundary line so as to prevent it running as far as it would run if the stream itself was named as a boundary. The purpose of such lines is well explained in the language of Mr. Justice Clifford: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the bank of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."<sup>1</sup> Or to quote the language of Mr. Justice Dillon:

in the above cases respectively. But where a description is employed which has not, by statute, usage, or judicial decision, acquired a fixed legal construction, or a boundary is referred to which is fluctuating and variable, other means must be resorted to in order to ascertain the meaning and construction of the deed. Now the word 'pond' is indefinite. It may mean a natural pond, or an artificial pond raised for mill purposes, either permanent or temporary, and in both cases the limits of such body of water may vary at different times and seasons, by use or by natural causes, and where the one or the other is adopted as a descriptive limit or boundary, a different rule of construction may apply. A large natural pond may have a definite low-water line, and then it would seem to be the most natural construction, and one which would be most likely to carry into effect the intent of the parties, to hold that land bounded upon such a pond would extend to low-water line, it being presumed that it is intended to give to the grantee the benefit of the water, whatever it may be, which he could not have upon any other construction. Where an artificial pond is raised by a dam, swelling a stream over its banks, it would be natural to presume that a grant of land bounding upon such a pond would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up as to become permanent, and to have acquired another well-defined boundary. But it is difficult to apply either of these rules to the present case, which is that of a pond originally natural, but which has been raised more or less by artificial means. The discovery of this fact, upon applying the deed to the local objects embraced within its descriptive terms, discloses a latent ambiguity. According to a well-established rule of evidence, therefore, it is competent to resort to parol proof, showing all the circumstances from which a legal inference can be drawn, that one or another line was intended by the ambiguous description used in the deed. And this is, in truth, what both parties have done in the present case."

<sup>1</sup> Railroad Co. v. Schurmer, 7 Wall. 272; Jefferis v. East Omaha Land



"The plaintiff's theory seems to be that defendant is only entitled to the quantity of land called for in the patent and shown on the plat; that the grant is limited to the meandered line. This is an error. The grantee gets all down to the river, be it more or less. The line is meandered chiefly to obtain the quantity, and the meander line is not a line of boundary."<sup>1</sup> The principle is so well established that it would serve no good purpose to elaborate it. Some of the cases in which it has been applied will be found in the note.<sup>2</sup>

**§ 1027. Estoppel from description of land as bounded by a street.**—Where the deed describes the premises as fronting a certain number of feet on a street, the grantor and all claiming under him are estopped from subsequently asserting that the street mentioned in the deed did not extend in front of the premises.<sup>3</sup> In such a case the grantee is entitled to have the street kept open for

Co., 134 U. S. 178. In *Harden v. Jordan*, 140 U. S. 371, the court say: "It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterward granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of water." In the case just cited the court held that the ruling of the Supreme Court of Illinois in *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, that a grant of lands bounded by a lake or stream does not extend to the center, was not essential to the decision of the case, was opposed to the previous decisions in that State, and, hence, it was disregarded. See, also, *Mitchell v. Smale*, 140 U. S. 406.

<sup>1</sup> *Kraut v. Crawford*, 18 Iowa, 549; 87 Am. Dec. 414. See, also, *Musser v. Hershey*, 42 Iowa, 364.

<sup>2</sup> *Schurmeier v. St. Paul R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; *Fuller v. Dauphin*, 124 Ill. 542; 7 Am. St. Rep. 388; *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112; *Bruce v. Taylor*, 2 J. J. Marsh. 100; *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139; *Minto v. Delaney*, 7 Or. 342; *Ladd v. Osborne*, 79 Iowa, 93; *Sphung v. Moore*, 120 Ind. 352; *Brown v. Huger*, 21 How. 320; *Yates v. Van de Bogert*, 56 N. Y. 526; *Churchill v. Grundy*, 5 Dana, 100; *Oakes v. De Lancey*, 133 N. Y. 227; 28 Am. St. Rep. 628.

<sup>3</sup> *White v. Smith*, 37 Mich. 291; *Smith v. Lock*, 18 Mich. 56; *Parker v. Smith*, 17 Mass. 413; 9 Am. Dec. 157. See *Transue v. Sell*, 105 Pa. St. 604, and cases cited.



his accommodation in the enjoyment of his property.<sup>1</sup> But a description in a deed of land bounded by a street, is not equivalent to a covenant of the existence of a street of the same width as a street of that name, when such street, though graded and laid out in a plan published by the former owner of the property, has subsequently been closed and plowed up. Such a description under these circumstances amounts only to a covenant of the existence of a way of reasonable width necessary and convenient for the use of the grantee in the use of the land conveyed.<sup>2</sup> A grantor in a deed bounding the land on a private way not defined in the deed, but shown upon a plan referred to in the deed, and recorded in the registry of deeds, is estopped to deny the existence of such way.<sup>3</sup> If the land conveyed is bounded by an alley, the alley when closed reverts to the owners adjoining.<sup>4</sup>

<sup>1</sup> *Smith v. Lock*, 18 Mich. 56; *Farming v. Osborne*, 34 Hun, 121. In *Smith v. Lock*, 18 Mich. 56, the description of the premises sold was: "Commencing at the northeast corner of the M. S. Railroad depot grounds, in the village of Burr Oak, thence south one hundred feet, thence easterly along the line of the company's ground until it intersects the creek, thence northerly along the line of said creek until it intersects the line of Front Street, thence westerly along said line of said street to the place of beginning." The grantor claimed afterward that Front Street did not extend along the front of this lot, and sold the land on the north side of the lot up to the grantee's line to another party, and the latter began to build a house upon the land which he thus bought. A bill was filed to obtain a perpetual injunction, and it was not denied that there was a street called Front Street which extended to the grantee's lot on the west, and which was fifty feet in width, and which, if extended in front of the lot in question, would include the house that the second purchaser was building. The court held that it did not follow because no street had been regularly laid out or dedicated to the public in front of the grantee's lot, that he was not entitled to relief; that it was a matter of private right, and was not affected by the question whether the public had acquired a right of way or not. And see *De Witt v. Van Schoyk*, 35 Hun, 103.

<sup>2</sup> *Walker v. City of Worcester*, 6 Gray, 548.

<sup>3</sup> *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Parker v. Bennett*, 11 Allen, 388; *Murdock v. Chapman*, 9 Gray, 156; *Morgan v. Moore*, 3 Gray, 319; *Lunt v. Holland*, 14 Mass. 149; *Sheen v. Stothart*, 29 La. Ann. 630; *Davis v. Rainsford*, 17 Mass. 207. And see *Tobey v. Taunton*, 119 Mass. 404; *Stetson v. Dow*, 16 Gray, 372.

<sup>4</sup> *Cincinnati & Georgia R. R. Co. v. Mims*, 71 Ga. 240; *Healey v. Babbitt*, 14 R. I. 533.

§ 1028. **Navigable streams and tide-waters.**—The rule where land is bounded by navigable streams or tide-waters is, that the grantor's right extends only to high-water mark.<sup>1</sup> In a case in Connecticut, Mr. Justice Daggett said: "The doctrine of the common law is, that the right to the soil of the proprietors of land on navigable rivers extends only to high-water mark; all below is *publici juris*—in the king, in England. That is the law in Connecticut; for we have no statute abrogating it. It was the law brought by our ancestors; it is our law; the soil being not indeed owned by the king, but by the State."<sup>2</sup> In a technical sense, arms of the sea, and rivers which flow and reflow with the tide, are said to be navigable. But generally, in this country, all rivers which are in fact navigable are considered to be such.<sup>3</sup>

§ 1028 a. **Reason for these rules.**—The natural presumption where a deed conveys land bordering on a stream or highway is, that the grantor means to convey what he owns, and not to reserve a strip of land of no value to him, but the loss of which to the grantee might be productive of great injury. He has power by apt words to reserve what and as much as he pleases, or so to frame the language of his conveyance as to limit the land conveyed to the line of the stream or highway, without extending further, and, in all such cases, courts are bound to give effect to his expressed intention. But in the absence of words showing such an intention, it is not presumed that the grantor intended to retain in himself the fee to the street or stream when he has parted with the adjoining land. Therefore it may be said to be a universal rule, that a deed giving a stream as a boundary

<sup>1</sup> Tomlin v. Dubuque etc. R. R. Co., 32 Iowa, 106; 7 Am. Rep. 176; Middleton v. Pritchard, 3 Scam. 520; 38 Am. Dec. 112; Adams v. Pease, 2 Conn. 481; McManus v. Carmichael, 3 Iowa, 1; Haight v. The City of Keokuk, 4 Iowa, 199; Canal Commissioners v. The People, 5 Wend. 423; Mayhew v. Norton, 17 Pick. 357; 28 Am. Dec. 300; Barney v. City of Keokuk, 4 Cent. L. J. 491.

<sup>2</sup> Chapman v. Kimball, 9 Conn. 38; 21 Am. Dec. 707.

<sup>3</sup> See term "Navigable," Bouvier Law. Dict.

will convey title to the center of the stream or to low or high water mark, depending upon how far the grantor's title extends. By such a description the grantor will convey all that he owns, unless a contrary intent appears from the language of the deed.<sup>1</sup> The deed is taken most strongly against the grantor in the application of this rule, and courts will not favor the presumption that he has retained title to the bed of the stream.<sup>2</sup> Where title passes to the thread of the stream, it will include an island lying between the thread of the stream and the land abutting the stream.<sup>3</sup> So islands are included which are separated from the mainland by sloughs.<sup>4</sup> A water line given as the boundary of a lot remains the boundary, however it may shift, and land up to such shifting water line is conveyed by a deed describing the lot by its number. When accretion occurs, the water line continues to be the boundary when named as such, and a deed passes title to all land extending to the water line.<sup>5</sup> Where land is described as beginning on the west bank of the creek, "thence follow said west bank on a general

<sup>1</sup> *Norcross v. Griffiths*, 65 Wis. 610; *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139; *Moody v. Palmer*, 50 Cal. 31; *Williamsburgh Boom Co. v. Smith*, 84 Ky. 375; *Watson v. Peters*, 26 Mich. 508; *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715; *Morrison v. Keen*, 3 Greenl. 474; *Sleeper v. Laconia*, 60 N. H. 201; 49 Am. Rep. 311; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95; 29 Am. St. Rep. 793; *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112; *Boston v. Richardson*, 105 Mass. 351; *Doane v. Willicutt*, 5 Gray, 328; *Mayhew v. Norton*, 17 Pick. 359; 28 Am. Dec. 300; *Lampish v. Bangor Bank*, 8 Greenl. 85; *Winslow v. Patten*, 34 Me. 25; *Chapman v. Edmands*, 3 Allen, 512; *Berry v. Snyder*, 3 Bush, 266; 96 Am. Dec. 219; *Lowell v. Robinson*, 16 Me. 357; 33 Am. Dec. 671; *Harlow v. Fisk*, 12 Cush. 304; *Williams v. Buchanan*, 1 Ired. 535; 35 Am. Dec. 760; *Warren v. Thomaston*, 75 Me. 329; 46 Am. Rep. 397; *Oakes v. De Lancey*, 133 N. Y. 227; 28 Am. St. Rep. 628; *Dunlap v. Stetson*, 4 Mason, 336; *Moore v. Griffin*, 22 Me. 350; *Thomas v. Hatch*, 8 Sum. 178; *Brown v. Hager*, 21 How. 306.

<sup>2</sup> *Palmer v. Farrell*, 129 Pa. St. 162; 15 Am. St. Rep. 708; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95; 29 Am. St. Rep. 793; *Holden v. Chandler*, 61 Vt. 291.

<sup>3</sup> *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139.

<sup>4</sup> *Fuller v. Dauphin*, 124 Ill. 542; 7 Am. St. Rep. 388.

<sup>5</sup> *Jeffries v. East Omaha Land Co.*, 134 U. S. 178.

course of north, four degrees twenty-four minutes west," the grantee takes the land to the margin of the creek at low-water mark, notwithstanding a survey of the land by courses and distances, set out in the deed, would not extend the line to the creek. The creek is a natural monument, and will prevail over the courses and distances.<sup>1</sup>

§ 1028 b. **Presumption overcome only by actual reservation.**—The presumption mentioned in the preceding section can be overcome only by an actual reservation in the deed, or by facts evincing an intention to limit the land conveyed to the precise boundaries of the description. Hence, if a grantor describes lands by metes and bounds, which include the whole of the bank of the stream, extending the whole distance of the part conveyed, the presumption is that he intended to convey all his interest in the bed of the stream, lying in front of the land conveyed, although no reference is made to the stream.<sup>2</sup>

<sup>1</sup> *Yates v. Van de Bogert*, 56 N. Y. 528.

<sup>2</sup> *Norcross v. Griffiths*, 65 Wis. 599; 56 Am. Rep. 642. The court states the reasons for this rule in the language of Justice Redfield in the case of *Buck v. Squires*, 22 Vt. 484, 494: "The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is, at the same time, one which the American courts, especially, have regarded as attended with very serious consequences when not rigidly adhered to, and its chief object is to prevent the existence of innumerable strips and gores of land along the margins of streams and highways, to which the title for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one consequently not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those who, in good faith, had supposed themselves secure from such embarrassment. It is, as I understand the law, to prevent the occurrence of just such contingencies as these, that in the leading, best reasoned, and best considered cases upon the subject, it is laid down and fully established that courts will always extend the boundaries of land, deeded as extending to and along the sides of highways and fresh water streams not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance, and to have this rule of the least practical importance to cure the evil which it is adopted to remedy, it must be applied to every case where there is not expressed an evident and manifest intention to the contrary—one from which no rational construction can escape. The rule, to be of any prac-

But where a description in a statute is "to the channel of George's river, thence down said channel till it intersects the town line, where it crosses the George's river"—the boundary line is the thread of the channel. "The channel," said the court, "is the deepest part of the river. It is the navigable part—the water-road over which vessels pass and repass. It is the highway of commerce. Had the line run to the river and down the river, the boundary would have been the bed of the stream—the *filum aquæ*. But the thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water. The channel and the thread of the river are entirely different. The channel may be one side of the thread of the river or the other."<sup>1</sup> Where a city is divided into lots and the lots are conveyed by numbers, a deed of those lying along a stream will carry the grantor's title to

tical utility, must be pushed somewhat to the extreme of ordinary rules of construction, so as to apply to all cases, when there is not a clearly expressed intention in the deed to limit the conveyance short of the middle of the stream or highway. If it is only to be applied like the ordinary rules of construction as to boundary, so as to reach as far as may be the clearly formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility as a rule of expediency or policy; for in ninety-nine cases in every hundred the parties at the time of the conveyance do not esteem the land covered by the highway of any importance either way; hence they use words naturally descriptive of the prominent ideas in their minds at the time, and in doing so define *the line which it is expected the party will occupy and improve.*" See, also, *Jones v. Pettibone*, 2 Wis. 308; *Yates v. Judd*, 20 Wis. 425; *Walker v. Shepardson*, 4 Wis. 486; 65 Am. Dec. 324; *Ford v. O. & N. W. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *Kimball v. Kenosha*, 4 Wis. 321; *Gove v. White*, 20 Wis. 425; *Wisconsin R. Imp. Co. v. Lyons*, 30 Wis. 61; *Wright v. Day*, 33 Wis. 260; *Pettibone v. Hamilton*, 40 Wis. 402; *Kneeland v. Van Valkenburgh*, 46 Wis. 437; 32 Am. Rep. 719; *Smith v. Ford*, 48 Wis. 163; *Valley P. & P. Co. v. West*, 58 Wis. 599; *Mariner v. Schulte*, 13 Wis. 692; *Elson v. Merrill*, 42 Wis. 203; *Boorman v. Sunnuchs*, 42 Wis. 233; *Young v. Harrison*, 6 Ga. 130; *Arnold v. Elmore*, 16 Wis. 509; *Moses v. Eagle & P. Mfg. Co.*, 62 Ga. 455.

<sup>1</sup> *Warren v. Thomaston*, 75 Me. 329; 46 Am. Rep. 397. The thread of the stream is a line equally distant from the two banks at the ordinary stage of the water: *Boscawen v. Canterbury*, 23 N. H. 188; *Hopkins v. Dickinson*, 9 Cush. 552.

the land lying between the lot and the thread of the stream.<sup>1</sup> But if a deed conveying a specified number of acres of a block adjoining a street, transfers title to the center of the street, it is not a necessary conclusion that this number of acres is to be estimated by extending the line to the center of the street. If the blocks are uniform in size, as four-acre blocks, for instance, and a deed describing them as such conveys the north two acres of a block, it practically conveys the north half of the block, excluding the street, and especially so if the deed describes a right of way over another portion of the same block.<sup>2</sup>

**§ 1029. Courses and distances controlled by monuments.**—If there is a conflict between them, the courses and distances given in the description must yield to the monuments.<sup>3</sup> “It is a general principle,” says Chief

<sup>1</sup> *Mariner v. Schulte*, 13 Wis. 775; *Watson v. Peters*, 26 Mich. 508; *Trustees v. Haven*, 11 Ill. 554. Where the word “shore” is used as a boundary, the decisions are not uniform as to the construction to be given to it. By some decisions the grantee takes to low-water mark: *Stevens v. King*, 76 Me. 197; 49 Am. Rep. 609; *Child v. Starr*, 4 Hill, 369. A deed, on the other hand, giving a boundary as “running to the river, and thence on the river shore” was held to convey land to the center of the stream: *Sleeper v. Laconia*, 60 N. H. 201; 49 Am. Rep. 311. And see *Starr v. Child*, 20 Wend. 149; *Woodman v. Spencer*, 54 N. H. 507; *Low v. Tibbitts*, 72 Me. 92; 39 Am. Rep. 303.

<sup>2</sup> *Fraser v. Ott*, 95 Cal. 661.

<sup>3</sup> *Turnbull v. Schroeder*, 29 Minn. 49; *Watson v. Jones*, 85 Pa. St. 117; *Burkholder v. Markley*, 98 Pa. St. 37; *Ayers v. Watson*, 113 U. S. 594; *Ellis v. Hunnicutt*, 71 Ga. 637; *Hurley v. Morgan*, 1 Dev. & B. 425; 28 Am. Dec. 579; *Hall v. Powel*, 4 Serg. & R. 456; 8 Am. Dec. 722; *Ripley v. Berry*, 5 Greene, 24; 17 Am. Dec. 201; *Den v. Graham*, 1 Dev. & B. 76; 27 Am. Dec. 226; *Davis v. Rainsford*, 17 Mass. 207; *Adams v. Alkire*, 20 W. Va. 480; *Daggett v. Willey*, 6 Fla. 482; *Welder v. Hunt*, 34 Tex. 44; *Credle v. Hays*, 88 N. C. 321; *Coles v. Wooding*, 2 Pat. & H. 189; *Beaudry v. Doyle*, 8 West C. Rep. 299; *Lewis v. Lewis*, 4 Or. 177; *Bolton v. Eggleston*, 61 Iowa, 163; *Simonton v. Thompson*, 55 Ind. 87; *Benton v. Horsley*, 71 Ga. 619; *Brown v. Huger*, 21 How. 305; *Woodward v. Nims*, 130 Mass. 70; *Kronneberger v. Hoffner*, 44 Mo. 185; *Haynes v. Young*, 36 Mo. 557; *Hogans v. Carruth*, 19 Fla. 84; *Evansville v. Page*, 23 Ind. 527; *Keenan v. Cavanaugh*, 44 Vt. 268; *Carville v. Hutchins*, 73 Me. 227; *Cottingham v. Parr*, 93 Ill. 233; *Kellogg v. Mullen*, 45 Mo. 571; *Walsh v. Hill*, 38 Cal. 481; *Morse v. Rogers*, 118 Mass. 572; *Norfolk Trust Co. v. Foster*, 78 Va. 413; *West v. Shaw*, 67 N. C. 494; *Marsh v. Mitchell*, 25 Wis. 706; *Husbands v. Semples*, 13 Mo. App. 589; *Thomson v. Wilcox*, 7 Lans. 376; *Park v.*



Justice Marshall, "that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if watercourses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied, so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses and distances are more probable and more frequent than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated and accurately described."<sup>1</sup>

Pratt, 38 Vt. 552; Riddlesburg etc. Coal Co. v. Rogers, 65 Pa. St. 416; Tyler v. Fickett, 73 Me. 410; Cunningham v. Curtis, 57 N. H. 157; Winans v. Cheney, 55 Cal. 567; Howe v. Bass, 2 Mass. 380; 3 Am. Dec. 59; Lodge v. Barnett, 46 Pa. St. 477; Wendell v. Jackson, 8 Wend. 183; 22 Am. Dec. 635; Brand v. Daunoy, 8 Martin, N. S., 159; 19 Am. Dec. 176; Frost v. Spaulding, 19 Pick. 445; 31 Am. Dec. 150; McPherson v. Foster, 4 Wash. C. C. 45; Harris v. Hull, 70 Ga. 831; Cilley v. Childs, 73 Me. 130; Clamorgan v. Baden etc. R. R. Co., 72 Mo. 139; Sanborn v. Rice, 129 Mass. 387; Oudney v. Early, 4 Paige, 209; Piercy v. Crandall, 34 Cal. 334; Smith v. McAllister, 14 Barb. 434; Bosworth v. Sturtevant, 2 Cush. 392; Town v. Needham, 3 Paige, 546; 24 Am. Dec. 246; Urquhart v. Burleson, 6 Tex. 502; Gavary v. Hinton, 2 Greene, 344; People v. Law, 34 Barb. 494; 22 How. Pr. 109; Nivin v. Stevens, 5 Har. (Del.) 272; Mitchell v. Burdett, 22 Tex. 633; Franklin v. Dorland, 28 Cal. 175; 87 Am. Dec. 111; Miller v. Beeler, 25 Ill. 163; Newman v. Foster, 4 Miss. (3 How.) 383; 34 Am. Dec. 98; Colton v. Seavey, 22 Cal. 496; Clark v. Wethey, 19 Wend. 320; Sayers v. Lyons, 10 Iowa, 249; Woods v. Kennedy, 5 Mon. 174; Van Wyck v. Wright, 18 Wend. 157; Nelson v. Hall, 1 McLean, 518; Nichols v. Turney, 15 Conn. 101; Campbell v. Clark, 8 Mo. 553; Cleaveland v. Smith, 2 Story, 278; Smith v. Dodge, 2 N. H. 303; Sumter v. Bracey, 2 Bay, 515; Massengill v. Boyles, 4 Humph. 205; Call v. Barker, 12 Me. (3 Fairf.) 320; Robinson v. White, 42 Me. 209; McGill v. Somers, 15 Mo. 80; Funa v. Manning, 11 Humph. 311; Pernam v. Wead, 6 Mass. 131; Aiken v. Sanford, 5 Mass. 494; Gerrish v. Bearce, 11 Mass. 193; Jackson v. Camp, 1 Conn. 605; Mayhew v. Norton, 17 Pick. 357; 28 Am. Dec. 300. See Piercy v. Crandall, 34 Cal. 334; Benedict v. Gaylord, 11 Conn. 332; 29 Am. Dec. 299; Peay v. Briggs, 2 Mill. Const. 98; 12 Am. Dec. 656; Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38.

<sup>1</sup> McIver's Lessee v. Walker, 9 Cranch, 173, 177. As to measurement



An action was brought for a breach of covenant of warranty in a deed, which described the land conveyed as bounded on the west by the land of a certain person. The distance on the north line from the east to the west end, as specified in the deed, extended seventeen feet beyond such person's northeast corner, and the distance on the south line extended six and a half feet beyond such person's southeast corner, so that by measurement the deed included a strip seventeen feet wide at the north end, and six and a half feet at the south end, and this strip was at the time of the execution of the deed in the possession of such third person, and was separated from the land owned by the grantor by a shed and a division fence. It was held that the shed and fence constituted monuments controlling the distances in the deed, and hence that there was no breach of the covenant of warranty.<sup>1</sup> A line was described as running "thence *westerly* including the cañadas to a stake, so that a line running from thence to the Dos Pedros will pass about two hundred yards from the present new corral of the said José Jesus Lopez." It was held that the monuments should control, although they determined the course of the line to be northeasterly instead of westerly.<sup>2</sup> Where a natural object is one of the monuments, and a line does not reach it, the line must be extended to such object, and the distance

of land bounded on one side by a meandering stream, see *Kimball v. Semple*, 25 Cal. 440; *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103; *Fratt v. Woodward*, 32 Cal. 219; 91 Am. Dec. 573; *Spring v. Hewston*, 52 Cal. 442; *Hall v. Shotwell*, 66 Cal. 379.

<sup>1</sup> *Cunningham v. Curtis*, 57 N. H. 157. And see, also, *Smith v. Negbauer*, 42 N. J. L. 305; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Andrew v. Watkins*, 26 Fla. 390; *Cowles v. Reavis*, 109 N. C. 417; *Adair v. White*, 85 Cal. 314; *Northern Ry. Co. v. Jordan*, 87 Cal. 23; *Payne v. English*, 79 Cal. 540; *Hubbard v. Dusy*, 100 N. C. 212; *Scott v. Pettigrew*, 72 Tex. 321; *Jones v. Andrews*, 72 Tex. 6; *McAninch v. Freeman*, 69 Tex. 445; *King v. Brigham*, 19 Or. 560; *Morse v. Rollins*, 121 Pa. St. 537; *Bloom v. Ferguson*, 128 Pa. St. 362; *Bushey v. Iron Co.*, 136 Pa. St. 541; *Menasha etc. Co. v. Lawson*, 70 Wis. 600. Although the monuments were never seen by the parties, they control the courses and distances: *Anderson v. Richardson*, 92 Cal. 623.

<sup>2</sup> *Colton v. Seavey*, 22 Cal. 496.

given must not be considered.<sup>1</sup> When a call is from one monument to another, the law will presume that a straight line was intended. But this presumption does not arise where it is evident from the language of the deed that a different line was intended.<sup>2</sup> If the call in the deed is from a monument to a creek, without specifying a definite point, the creek is not to be considered a monument within the meaning of this rule.<sup>3</sup>

**§ 1029 a. Erroneous description in incident of title.** It is the duty of courts to uphold deeds when possible, and where a question arises as to the sufficiency of the form of the deed to convey the land intended, the fact that an incident in the history of the title of the land is erroneously described will not prevail against the force of metes, bounds, courses, distances, and visible monuments. In the interpretation of all contracts, the object is to effectuate the intention of the parties.<sup>4</sup> Where the land to be conveyed was described as "all that tract or upper island of land called Eden," and was then described by bounds, courses, and distances, which did not embrace all the island, the court held that the title to the whole island passed by the deed.<sup>5</sup> If the land is described

<sup>1</sup> *Strickland v. Draughan*, 88 N. C. 315; *Hogans v. Carruth*, 19 Fla. 84.

<sup>2</sup> *Fratt v. Woodward*, 32 Cal. 219; 91 Am. Dec. 573.

<sup>3</sup> *Fratt v. Woodward*, 32 Cal. 219; 91 Am. Dec. 573.

<sup>4</sup> *Sherwood v. Whiting*, 54 Conn. 330; 1 Am. St. Rep. 116. In that case the property intended to be conveyed was described as "All the real estate of Oran Sherwood, deceased, which was distributed to Franklin Sherwood in the distribution of said estate, and afterward conveyed to me by said Franklin Sherwood, by sundry deeds as recorded in Fairfield land records." As a matter of fact Franklin Sherwood had conveyed before the distribution of the estate, and not afterward, and had made the conveyance for the purpose of concealing the property from his creditors. His deed, however, described fully the land conveyed. Suit was brought to compel the heirs of the grantor to execute a corrected deed, but the court held that it required no correction.

<sup>5</sup> *Lodge v. Lee*, 6 Cranch, 237. See, for further instances, *Worthington v. Hilyer*, 4 Mass. 196; *Jackson v. Barringer*, 15 Johns. 471; *Melvin v. Proprietors*, 5 Met. 15; 38 Am. Dec. 384; *Cate v. Thayer*, 3 Me. 71; *Keith v. Reynolds*, 3 Me. 393. The owner of a farm conveyed it by deed,

as a "homestead farm," with a designation of the number of acres, the whole parcel will pass, although it contains twice the number of acres mentioned.<sup>1</sup>

**§ 1030. When courses and distances prevail.—**Where the monument described in the deed cannot be found, and neither its location nor existence can be proven, the location of the land must be determined by the other parts of the description. If the land is described by definite and distinct boundaries from which it may be located, the description cannot be varied or controlled by parol evidence.<sup>2</sup> If one of the lines is described as running a certain number of rods to a stake and stones, and there is no such monument, the end of the line, in the absence of evidence that there was a contrary intent, is to be determined by the measurement.<sup>3</sup> Where the deed shows an intention to convey a specific quantity of land, and this exact quantity is included within the courses and distances, and the description by monuments embraces a larger or smaller quantity, the former description will prevail.<sup>4</sup> When the deed would be defeated by applying the rule that monuments control courses and distances, and when the rejection of a call for a monument will reconcile other parts of the description and leave sufficient to identify the land, the rule as to monuments will not be enforced.<sup>5</sup> Where no monuments are

which described it as "the farm on which I now live, and is the same which was deeded to me by J. G., March 15, 1810, reference being had to said deed. The deed of March 15, 1810, did not include a lot of land which had formed part of the farm for forty years, but it had been conveyed to the grantor by J. G. by a deed dated January 11, 1810, and the court held that this lot was conveyed by the deed: *Hastings v. Hastings*, 110 Mass. 280.

<sup>1</sup> *Andrews v. Pearson*, 68 Me. 19. See, also, *Dwight v. Tyler*, 49 Mich. 614; *Wiley v. Lovely*, 46 Mich. 83; *Deacons etc. v. Walker*, 124 Mass. 69; *Union etc. v. Skinner*, 9 Mo. App. 189; *Green Bay etc. v. Hewitt*, 55 Wis. 96; 42 Am. Rep. 701.

<sup>2</sup> *Drew v. Swift*, 46 N. Y. 204; *Bagley v. Morrill*, 46 Vt. 94.

<sup>3</sup> *Wilson v. Hildreth*, 118 Mass. 578.

<sup>4</sup> *Higinbotham v. Stoddard*, 72 N. Y. 94; *Buffalo etc. R. R. Co. v. Stigeler*, 61 N. Y. 348.

<sup>5</sup> *White v. Luning*, 93 U. S. 514.

referred to in the deed, and none are intended to be erected, the distances stated in the description must govern the location.<sup>1</sup>

**§ 1031. Latent ambiguity as to monument intended.** There may be cases where there is a latent ambiguity as to the monument intended by the parties. The monument, if it can be ascertained, must control. But when a latent ambiguity exists as to its location, courses and distances, and the estimated quantity of the land, are entitled to some weight in determining what the intention of the parties was.<sup>2</sup> Where a grantor executes on the same day two deeds of contiguous lots of land, by the course and distance calls of which the lots overlap each other, a common boundary line is not established. The party who is in possession to the extent warranted by the calls of his deed cannot be ousted by the calls of the other deed.<sup>3</sup>

**§ 1031 a. Supplying omissions.**—Omissions may be sometimes supplied so as to cure an imperfect description in a deed, if the instrument contains, in other respects, sufficient facts to enable this to be done. For instance, the word “of” was supplied in a description, reading, “the north half of the southwest quarter the southwest quarter” of a certain section, when the call for quantity supported this construction.<sup>4</sup> Where a call is “east with” it may be

<sup>1</sup> *Negbauer v. Smith*, 44 N. J. L. 672. And see *Winans v. Cheney*, 55 Cal. 567. For a case in which a monument was considered as descriptive only, and that it should not receive undue prominence, see *Jones v. Bunker*, 83 N. C. 324. See, also, *Loring v. Norton*, 8 Me. (8 Greenl.) 61; *Preston v. Bowmar*, 2 Bibb, 493; *Hamilton v. Foster*, 45 Me. 32; *Bradford v. Hill*, 1 Hayw. (N. C.) 22; 1 Am. Dec. 546; *O'Hara v. O'Brien*, 107 Cal. 309.

<sup>2</sup> *Doe v. Vallejo*, 29 Cal. 385.

<sup>3</sup> *Keen v. Schnedler*, 15 Mo. App. 590.

<sup>4</sup> *Burnett v. McOluey*, 78 Mo. 676. Said the court: “The general rule is, that effect should be given, if practicable, to every part of the description. The words ‘the north half of the southwest quarter the southwest quarter of section 6’ certainly constitute a novel description. It would seem to be highly improbable that a grantor would, under any circumstances, first grant the north half of the southwest quarter, and

construed to mean "east *parallel* with." "When the deed," says Mr. Justice Black, "applied to the subject matter, shows a manifest omission in the description, and there is sufficient data furnished by the deed to supply the omission, the omission will be supplied by construction."<sup>1</sup> Where the land was described as the "northwest quarter of the northwest section 8, T. 29 south, of range 16 east, containing 40 acres," the words "quarter of" next preceding the word "section" in the description were supplied by construction as an evident omission.<sup>2</sup> If a deed omits one of the calls in the field notes, yet if, by the description given, and by reversing the calls in the field notes, the missing call can be supplied and the land to be conveyed ascertained, the deed is not void for uncertainty.<sup>3</sup> Parol evidence may be received for the purpose of aiding a deed of this character.<sup>4</sup> Where it appeared from the whole description in a deed that a certain block was intended, a call for the block by an erroneous number was held to be properly rejected.<sup>5</sup>

§ 1032. **Subsequent survey.**—Where the description of a deed gives as the commencing point of the tract conveyed a visible monument, which is clearly ascertained,

then, by words immediately following, grant the entire southwest quarter: *Campbell v. Johnson*, 44 Mo. 247. If the description were an abbreviated one, and stood thus: 'N. 1-2, S. W. 1-4, S. W. 1-4, sec. 6,' few persons familiar with the system adopted for the survey and subdivision of lands in the western States, and the abbreviations in use for the designation of such subdivisions, would hesitate to construe such description to mean the north half of the southwest quarter of the southwest quarter of section 6. But when such abbreviated descriptions are translated into words, it is usual to insert both the words 'of' and 'the' after the words and figures designating the subdivisions."

<sup>1</sup> *Deal v. Cooper*, 94 Mo. 62.

<sup>2</sup> *Campbell v. Carruth*, 32 Fla. 264; 13 So. Rep. 432. In *Moss v. Shear*, 30 Cal. 467, there is a discussion as to what may be supplied by construction.

<sup>3</sup> *Montgomery v. Carlton*, 56 Tex. 431.

<sup>4</sup> *Montgomery v. Carlton*, 56 Tex. 431; *Edwards v. Bowden*, 99 N. C. 80; 6 Am. St. Rep. 487. See, also, § 1015 a, *ante*.

<sup>5</sup> *Murray v. Hobson*, 10 Colo. 66; 13 Pac. Rep. 921. In this case block 32 was construed to mean block 30.

and the other parts of the description are certain and definite, every requirement of the law as to sufficiency of description is satisfied, and the title of the grantor passes to the grantee if apt words of conveyance are used. If a survey is subsequently made which changes the location of a larger tract, within which, according to the language of the deed, the land conveyed was located, or if the subsequent survey restricts the area of such tract, the title of the grantee is not divested nor his rights impaired.<sup>1</sup> If the starting point of a description is the corner of a subdivision according to the survey made by the United States, such corner becomes a monument and will control, notwithstanding the grantor, at the time of sale, by an actual survey fixed the stake at another point, and the lines were run accordingly.<sup>2</sup> Where the tract of land conveyed is described only by the name of the township or the subdivision of the township, and such tract is a subdivision according to the United States survey, the deed is considered as referring to the line of the survey made by the United States and the monuments then erected.<sup>3</sup>

**§ 1032 a. Reliance on survey.**—Where the platter of town lots has set stakes, purchasers may locate their lines accordingly, and such lines cannot be unsettled by a subsequent survey. Notwithstanding errors in locating them, they must control, and the question is not whether they were correctly placed, but whether they were planted by authority, and, relying on them, persons have purchased lots and taken possession.<sup>4</sup> The direct testimony of witnesses who saw the corners located by the original survey, cannot be overcome by a new survey showing location of quarter-section corners.<sup>5</sup> When the lines were run upon

<sup>1</sup> *Widbur v. Washburn*, 47 Cal. 67.

<sup>2</sup> *Powers v. Jackson*, 50 Cal. 429. If the calls in the description correspond with one another, they cannot be varied by parol evidence to show that they are not the calls in the survey as they were actually made: *Johnson v. Archibald*, 78 Tex. 96; 22 Am. St. Rep. 27.

<sup>3</sup> *Powers v. Jackson*, 50 Cal. 429.

<sup>4</sup> *Le Compte v. Lueders*, 90 Mich. 495; 30 Am. St. Rep. 450.

<sup>5</sup> *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474.

the ground, the survey as it was actually made may be always shown.<sup>1</sup> An official survey will overcome a private one.<sup>2</sup> For the purpose of relocating lost corners by lines run by an official surveyor, a private survey of the ground, well-known marks and corners, and the field notes and plat may be considered, although the private survey does not harmonize in every particular with the official survey.<sup>3</sup> A relocation of an original monument marking a corner that has been lost can only be made approximately by measurements from other corners.<sup>4</sup> In relocating the boundaries of a survey, topographical features of the country, and of a road, gulch, and houses described as monuments, will prevail over the specified courses of the boundary lines.<sup>5</sup> Where the land is described as a legal subdivision of surveyed land, and the location of the four corners is reasonably certain, but the quarter-section corners are lost, and there are more than six hundred and forty acres within the section, the division lines of the fractions of the section will be determined by a division *pro rata* of the lines of the section as they appear upon the ground.<sup>6</sup>

**§ 1033. Conflict between starting point and other calls.**—When a conflict arises between the starting point and other calls, the starting point, if it is fixed, certain, and notorious, will generally prevail. But if the other calls may as readily be ascertained, and are as little liable to mistake, they are entitled to as much consideration as the first. If they all agree, they control.<sup>7</sup>

**§ 1034. Running to line of another tract.**—Where the line of another tract is called for in the description

<sup>1</sup> Johnson v. Archibald, 78 Tex. 96; 22 Am. St. Rep. 27.

<sup>2</sup> Billingsley v. Bates, 30 Ala. 376; 68 Am. Dec. 126.

<sup>3</sup> Billingsley v. Bates, 30 Ala. 376; 68 Am. Dec. 126.

<sup>4</sup> Anderson v. Peterson, 74 Iowa, 482.

<sup>5</sup> Tognazzini v. Morganti, 84 Cal. 159.

<sup>6</sup> Eshleman v. Malter, 101 Cal. 233; Miller v. Topeka Land Co., 44 Kan. 354.

<sup>7</sup> Walsh v. Hill, 38 Cal. 481.



in a deed as one of the boundaries of the land conveyed, the line must be run to such boundary line regardless of distance.<sup>1</sup> And this is true even if it be necessary to ascertain such line itself by course and distance.<sup>2</sup> Where, in the description, the land is bounded on one side by the land of a third person, the true boundary line between the land conveyed and the land of such third person must be taken as the boundary line, and not the line as it was understood to exist at the time of the execution of the deed, if there is a variance between such two lines.<sup>3</sup> Where one of the boundaries given is "south to A and B's line," and they have no land in common, the boundary line must be run after reaching A's line until it comes to B's line.<sup>4</sup> A subsequent deed is not admissible in evidence for the purpose of showing the boundaries of a tract previously conveyed.<sup>5</sup>

§ 1035. "Northerly," "due north," etc.—The term "northerly," when not controlled by monuments mentioned in the description, signifies due north.<sup>6</sup> The courses north, south, east, and west may, when controlled by other definite and certain descriptions, be read northerly, southerly, easterly, and westerly, if by so doing all the calls will be made consistent and harmonious.<sup>7</sup> But the terms "northerly," "northwesterly," etc., are only

<sup>1</sup> *Cansler v. Fite*, 5 Jones (N. C.), 424; *Northrup v. Sumney*, 27 Barb. 196; *Whittelsey v. Kellogg*, 28 Mo. 404; *Bolton v. Lann*, 16 Tex. 96.

<sup>2</sup> *Cansler v. Fite*, 5 Jones (N. C.), 424.

<sup>3</sup> *Umbarger v. Chaboya*, 49 Cal. 525; *Cornell v. Jackson*, 9 Met. 150.

<sup>4</sup> *Osborne v. Anderson*, 89 N. C. 261.

<sup>5</sup> *Cutter v. Caruthers*, 48 Cal. 178. In this case, a tract of land called the "McDougal tract," was intended by the parties to have for its southern boundary another tract called the "McKinstry tract." A deed conveying the "McKinstry tract," executed after the conveyance of the "McDougal tract," was held not to be admissible in evidence for the purpose of showing what lands the grantees of the "McDougal tract" supposed, at the time they received their conveyance, were held by the owners of the "McKinstry tract."

<sup>6</sup> *Bosworth v. Danzien*, 25 Cal. 296; *Brandt v. Ogden*, 1 Johns. 156; *Carrier v. Nelson*, 96 Cal. 505; 31 Am. St. Rep. 239; *Reed v. Tacoma Building etc. Assn.*, 2 Wash. 198; 26 Am. St. Rep. 851.

<sup>7</sup> *Faris v. Phelan*, 39 Cal. 612.

construed as "due north," and "due northwest," when, if this construction were not adopted, the deed would be void for want of certainty. Calls of this kind, however, must give way to visible monuments, or to any other description of a line which makes its location reasonably certain.<sup>1</sup> "Easterly," used alone, in its strict significance, and unmodified by other language, will be construed to mean due east. If its meaning is qualified by the use of other words, it means precisely what the words of qualification make it signify.<sup>2</sup>

§ 1036. **Division lines by consent.**—A boundary line may be established by adjoining landowners. When they so agree upon a boundary line, enter into possession, and improve the lands according to the line thus accepted, they will not afterward be allowed to claim that the line agreed upon is not the true one, although the bar of the statute of limitations has not attached.<sup>3</sup> But the proof should be clear, and slight acts from which the inference of an agreement might be drawn should not be considered conclusive.<sup>4</sup> A deed described the land conveyed as

<sup>1</sup> *Irwin v. Towne*, 42 Cal. 326. This section was cited as authority in *Martin v. Lloyd*, 94 Cal. 195, 202, where the court said: "Assuming that 'N.' as here used, stands for 'north,' and not for some other word expressing generally a northern direction, still, such a word means 'due north' only when that construction is necessary for certainty, or when there is nothing else to show that it was not used in that strict sense."

<sup>2</sup> *Fratt v. Woodward*, 32 Cal. 219; 91 Am. Dec. 573.

<sup>3</sup> *McNamara v. Seaton*, 82 Ill. 498; *Orr v. Hadley*, 36 N. H. 575; *Cutler v. Oallison*, 72 Ill. 113; *Ebert v. Wood*, 1 Binn. 216; 2 Am. Dec. 436; *Bolton v. Lann*, 16 Tex. 96; *Houston v. Sneed*, 15 Tex. 307; *Columbet v. Pacheco*, 48 Cal. 395; *Eaton v. Rice*, 8 N. H. 378; *Sneed v. Osborn*, 25 Cal. 619; *Sawyer v. Fellows*, 6 N. H. 107; 25 Am. Dec. 452; *Davis v. Judge*, 46 Vt. 655; *Foulke v. Stockdale*, 40 Iowa, 99; *Fahey v. Marsh*, 40 Mich. 236; *Camp v. Cochrane*, 71 Ga. 865; *Kile v. Tubbs*, 23 Cal. 431; *Bauer v. Gottmanhausen*, 65 Ill. 499. See *Crowell v. Maughs*, 2 Gilm. 419; 43 Am. Dec. 62; *Yates v. Shaw*, 24 Ill. 367; *Rockwell v. Adams*, 7 Cowen, 761; *Edwards v. White Co.*, 85 Ill. 390; *Wakefield v. Ross*, 5 Mason, 15; *Piercy v. Crandall*, 34 Cal. 334; *Jackson v. Ogden*, 7 Johns. 238; *Voeburgh v. Teator*, 32 N. Y. 561; *Boyd's Lessee v. Graves*, 4 Wheat. 513; *Jackson v. Freer*, 17 Johns. 29.

<sup>4</sup> *McNamara v. Seaton*, 82 Ill. 498, 500, per Craig, J. In *Cutler v. Oallison*, 72 Ill. 113, 115, the court said: "This principle proceeds upon

running back from a street eighty-five feet, more or less, and bounded in the rear by the grantor's land, which was a part of the same tract. The grantor, after the execution of the deed, but before he had sold any more of the land, prepared and placed on record a plan of the land in which the part conveyed was laid down as running to a length of eighty-eight feet from the street. It was held that the grantee took according to the plan, as the acts of the grantor were equivalent to the fixing of a line or monument.<sup>1</sup> A boundary line was described as running "northerly to land of M., thence southeasterly to M's land, thirty-eight rods and one-half to a stump and stones." Immediately after the execution of the deed, the parties went upon the land, the monuments at the northwesterly and the northeasterly corners were pointed out, and the distance between them was exactly thirty-eight rods and a half. But there was a small strip of land between this line and the land of M; still it was held that the monuments agreed upon were to govern, and that this strip of land did not pass by the deed.<sup>2</sup> And it may be observed that where the deed refers for its boundaries to monuments which at the time are not actually in existence, but are afterward erected by the parties, they will be bound by such monuments in the same manner as if they had been erected before the execution

the ground, not that title can pass by parol agreement, but that the extent of the ownership of the land of each has been agreed upon, settled, and finally determined: *Crowell v. Maughs*, 2 Gilm. 419; 43 Am. Dec. 82; *Kip v. Norton*, 12 Wend. 127; 27 Am. Dec. 120; *McCormick v. Barnum*, 10 Wend. 109; *Vosburgh v. Teator*, 32 N. Y. 561. The courts always look with favor upon the adjustment of controverted matters of this character by agreement of the parties in interest, and when an agreement to establish a boundary line is fairly and clearly made, and possession of the land held according to the line so agreed upon, no reason is perceived why such agreements should not be conclusive." An agent not authorized to agree upon a division line, but employed merely as a superintendent, cannot bind the owner by staking a line to show how far tenants of the land should plow: *O'Hara v. O'Brien*, 107 Cal. 309.

<sup>1</sup> *Blaney v. Rice*, 20 Pick. 62; 32 Am. Dec. 204.

<sup>2</sup> *Frost v. Spaulding*, 19 Pick. 445; 31 Am. Dec. 150.

of the deed.<sup>1</sup> An agreement between grantor and grantee as to a boundary line, must, in order to be effectual, be made while they own the lands on both sides of the line which they thus locate.<sup>2</sup> If a division fence is acquiesced in by the parties for the period of sixteen years, they are estopped from asserting the incorrectness of the location.<sup>3</sup> And although the deeds of both parties call for a straight line between admitted landmarks, and a division fence is crooked, yet if it has stood for twenty-one years, it will constitute the line between the adjoining owners.<sup>4</sup> When the description is so uncertain that a line may run in two different ways, and still not be inharmonious with the other calls of the deed, either line may be adopted by the parties. Both parties are concluded by the line when it is so established.<sup>5</sup>

§ 1037. **Line located by mistake.**—But where adjoining proprietors have made a mistake in the location of a division line, it will not be held binding and conclusive upon them if, by disregarding it, no injustice will be done.<sup>6</sup> Where the boundaries are indefinite and uncertain, and they are run out and marked by the owner of

<sup>1</sup> *Lerned v. Morrill*, 2 N. H. 197; *Blaney v. Rice*, 20 Pick. 62; 32 Am. Dec. 204; *Kennebec Purchase v. Tiffany*, 1 Me. (1 Greenl.) 219; 10 Am. Dec. 60; *Waterman v. Johnson*, 13 Pick. 267. See *Davis v. Rainsford*, 17 Mass. 212.

<sup>2</sup> *Sneed v. Osborn*, 25 Cal. 619.

<sup>3</sup> *Columbet v. Pacheco*, 48 Cal. 395.

<sup>4</sup> *Curry v. Raymond*, 28 Pa. St. 149.

<sup>5</sup> *Hastings v. Stark*, 36 Cal. 122. Adjoining landowners may become tenants in common in trees on a boundary line, and either may be enjoined from destroying them: *Musch v. Burkhardt*, 83 Iowa, 301; 32 Am. St. Rep. 305. A tree, the trunk of which is on the boundary line between adjoining owners, is held in common: *Dubois v. Beaver*, 25 N. Y. 123; 82 Am. Dec. 326. But otherwise if exclusively on the land of one, though the roots and branches may reach beyond the boundary: *Hoffman v. Armstrong*, 48 N. Y. 201; 8 Am. Rep. 537; *Skinner v. Wilder*, 38 Vt. 115; 88 Am. Dec. 645. A nuisance is not caused by a row of trees planted near a boundary line. Merely the land of an adjoining owner is thereby rendered unfit for a purpose for which he has made no attempt to use it: *Grandona v. Lovdal*, 78 Cal. 611; 12 Am. St. Rep. 121.

<sup>6</sup> *Menkens v. Blumenthal*, 27 Mo. 198.

the land, the presumption as against him is that this was correctly done; but he may overcome this presumption by proof of a mistake, and by showing that there is a material variance between the true lines and the lines as marked.<sup>1</sup> Where neither party intends to claim beyond the true line, possession, up to what is erroneously supposed to be the true dividing line between adjoining proprietors, will not work a disseisin in favor of either of any land occupied by him under such erroneous belief.<sup>2</sup> But, although a location of a boundary line may have been originally made under an agreement resulting from a mutual mistake of fact, still, an acquiescence for forty years in such practical location is conclusive.<sup>3</sup>

§ 1037 a. **Further consideration of subject.**—It must be admitted that the decisions are not uniform on this subject, but we believe the weight of authority sustains the proposition we have stated. Whether the establishment of a boundary line depends upon the theory of an agreement by the parties to locate a dividing line, or on the theory that the continuous possession of a strip of land not included in the description of the deed constitutes adverse possession, yet the element of intent with which possession is taken and held must be material. If such possession is the result of mistake, without an intent on the part of the person in possession to encroach upon his neighbor, and hold more land than that to which he is entitled, such possession cannot be said to be adverse, until it is known where the true boundary line lies. Then the opportunity is presented for him to decide whether he will claim adversely, land which is not embraced within the description contained in his deed.

<sup>1</sup> *Cunningham v. Roberson's Lessee*, 31 Tenn. (1 Swan) 138. And see *Gray v. Couvillon*, 12 La. Ann. 730, where it is held that parties are not bound by a consent to boundaries which have been made under an apparent error, unless, perhaps, by a prescription of thirty years. And see *Lemmon v. Hartsook*, 80 Mo. 13.

<sup>2</sup> *Houx v. Batteen*, 68 Mo. 84.

<sup>3</sup> *Baldwin v. Brown*, 16 N. Y. 359. And see, also, *Major's Heirs v. Rice*, 57 Mo. 884.

The current of authority, in our opinion, justifies us in stating the rule to be that the location of a boundary line, made through mistake or ignorance of the true line, with no intention to claim beyond the true line, wherever it may be, will not bind the parties, so as to prevent them from showing the truth, and having the lines established as they were originally intended and, in justice, ought to be.<sup>1</sup> While this is undoubtedly the general rule, yet in many jurisdictions the principle prevails, that the question whether a line was located by mistake or not is immaterial, and that the possession beyond the true line, under a mistake as to its location, must be considered as adverse, and, if continued for the length of time prescribed by the statute of limitations, will extinguish the title of the owner.<sup>2</sup> In California, it is held that the possession

<sup>1</sup> *Battner v. Baker*, 108 Mo. 311; 32 Am. St. Rep. 606; *Krider v. Milner*, 99 Mo. 145; 17 Am. St. Rep. 549; *Jacobs v. Moseley*, 91 Mo. 457; *Schad v. Sharp*, 95 Mo. 574; *Skinker v. Haagsma*, 99 Mo. 209; *Kunze v. Evans*, 107 Mo. 487; 28 Am. St. Rep. 435; *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383; *Crawford v. Ahrnes*, 103 Mo. 88; *Houx v. Batteen*, 68 Mo. 84; *Tamm v. Kellogg*, 49 Mo. 118; *St. Louis University v. McKune*, 28 Mo. 481; *Keen v. Schnedler*, 92 Mo. 516; *Knowlton v. Smith*, 36 Mo. 507; 88 Am. Dec. 152; *McDonald v. Fox*, 20 Nev. 364; *Wood v. Willard*, 37 Vt. 377; 86 Am. Dec. 716; *Brown v. Gray*, 3 Greenl. 126; *Worcester v. Lord*, 56 Me. 265; 96 Am. Dec. 546; *Dow v. McKenney*, 64 Me. 138; *Brown v. Cockerell*, 33 Ala. 38; *Sartain v. Hamilton*, 12 Tex. 219; 62 Am. Dec. 524; *Grube v. Wells*, 34 Iowa, 148; *Burnell v. Russell*, 39 Vt. 579; 94 Am. Dec. 358; *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474; *Gates v. Butler*, 3 Humph. 447; *Skinner v. Crawford*, 54 Iowa, 119; *Burnell v. Russell*, 39 Vt. 579; 94 Am. Dec. 358; *Howard v. Reedy*, 29 Ga. 152; 74 Am. Dec. 58; *Gilcrist v. McLaughlin*, 7 Ired. 310; *Sheils v. Haley*, 61 Cal. 157; *Breen v. Donnelly*, 74 Cal. 304. This rule also applies to the public: *State v. Welpton*, 34 Iowa, 144.

<sup>2</sup> *Ramsey v. Glenney*, 45 Minn. 401; 22 Am. St. Rep. 736; *Canfield v. Clark*, 17 Or. 473; 11 Am. St. Rep. 845; *Tex. v. Pflug*, 24 Neb. 666; 8 Am. St. Rep. 231; *French v. Pearce*, 8 Conn. 439; 21 Am. Dec. 680; *Smith v. McKay*, 30 Ohio St. 418; *Metcalf v. McCutcheon*, 60 Miss. 145; *Mode v. Long*, 64 N. C. 433; *Seymour v. Carli*, 31 Minn. 81; *Yetzer v. Thompson*, 17 Ohio St. 130; 91 Am. Dec. 122; *Swettenham v. Leary*, 18 Hun, 287; *Levy v. Yerga*, 25 Neb. 764; 13 Am. St. Rep. 525; *Erck v. Church*, 87 Tex. 575; *Harn v. Smith*, 79 Tex. 310; 23 Am. St. Rep. 340; *Coleman v. Smith*, 55 Tex. 259; *Atwood v. Canrike*, 86 Mich. 99; *Hoffman v. White*, 90 Ala. 354. In some States, where the rule prevails as announced in the text, the decisions are conflicting. Compare with the

of land, under a mistake as to the boundary line, will not defeat any claim to title founded on such possession, and it is said that the doctrine that such possession should be accompanied by a claim of title, is founded upon a fallacy.<sup>1</sup> The law in that State may be said to be that title to land may be acquired by the adverse possession of land for the statutory period within the limits of an inclosure, notwithstanding the land was so inclosed under a mistake as to its boundaries, where it is claimed that the fences were constructed, as a matter of fact, on the true line; but, if no claim was made that the fences were on the true line, but they were erected with the expectation of moving them to the true line when it should be ascertained, the possession is not adverse.<sup>2</sup>

**§ 1038. Two descriptions in deed.**—Where the deed contains two descriptions of the land conveyed equally explicit, but between which there is a repugnance, that description which the whole instrument shows best expresses the intention of the parties must control.<sup>3</sup> The court will look into the surrounding facts, and will adopt the description which is most definite and certain, and which,

decisions cited in the prior note: *Cole v. Parker*, 70 Mo. 372; *Handlan v. McManus*, 100 Mo. 125; 18 Am. St. Rep. 533; *Grimm v. Curley*, 43 Cal. 250. The Supreme Court of Missouri, in a recent case, attempts to reconcile the conflicting decisions in that State by declaring that when adjoining landowners claim only to the true line, wherever that may be, they are not bound by the supposed line, but must conform to the true line when it is ascertained, but where a person has possession up to a fence, and claims to be the owner up to it this possession is adverse, although he may believe the fence to be on the true line. "The distinction between these rules," said the court, "lies in the fact whether the party claimed only to the true line, wherever that might be, or to the fence": *Battner v. Baker*, 108 Mo. 311; 32 Am. St. Rep. 606.

<sup>1</sup> *Woodward v. Faris*, 109 Cal. 17; *Silverer v. Hansen*, 74 Cal. 584; *Grimm v. Curley*, 43 Cal. 250.

<sup>2</sup> *Woodward v. Faris*, 109 Cal. 17. But see, also, decisions cited in previous notes, and compare *O'Hara v. O'Brien*, 107 Cal. 309.

<sup>3</sup> *Moore v. Massini*, 37 Cal. 432; *Driscoll v. Green*, 59 N. H. 101; *Wade v. Deray*, 50 Cal. 376; *Raymond v. Coffey*, 5 Or. 132. See *Den v. Graham*, 1 Dev. & B. 76; 27 Am. Dec. 226; *Reamer v. Nesmith*, 34 Cal. 624; *Benedict v. Gaylord*, 11 Conn. 332; 29 Am. Dec. 299; *Wendell v. Jackson*,



in the light of surrounding circumstances, can be said to effectuate most clearly the intention of the parties.<sup>1</sup> A description in a deed was: "All that certain lot of land situate in said city of Concord, on the north side of Chapel street, fifty feet; westerly by land of said Vail and late Samuel Frye, fifty feet; and easterly by land of said Vail, about ninety-eight feet; with the buildings thereon, intending to include only the land on which said buildings are situated, and the yard inclosed within the fence as now built." The question before the court was whether the particular description of the property conveyed was controlled and limited by the words "intending to include only the land on which said buildings are situated, and the yard inclosed within the fence as now built." The court held that, from the facts of the case, the second description being clearly erroneous, should not control.<sup>2</sup>

8 Wend. 183; 22 Am. Dec. 635; *Moss v. Shear*, 30 Cal. 467. For a case in which it was held that there was no repugnance in the descriptive clause of the deed, see *Castro v. Tennent*, 44 Cal. 253. See, also, *Vose v. Handy*, 2 Greene, 322; 11 Am. Dec. 101.

<sup>1</sup> *Wade v. Deray*, 50 Cal. 376. Where land is described by metes and bounds, and the deed also states that it is all of a tract of land, described in another mode, effect will be given, if the two descriptions do not agree, to the larger and more comprehensive description. As a consequence, the deed will convey the land embraced in both descriptions: *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514; 46 Am. St. Rep. 355.

<sup>2</sup> *Driscoll v. Green*, 59 N. H. 101. In this case, Mr. Justice Clark, in delivering the opinion of the court, said: "A deed is to be construed according to the intention of the parties as manifested by the entire instrument, although such construction may not comport with the language of a particular part of it: *Allen v. Holton*, 20 Pick. 458, 463; *Worthington v. Hylyer*, 4 Mass. 196; *White v. Gay*, 9 N. H. 126; 31 Am. Dec. 224; *Johnson v. Simpson*, 36 N. H. 91; *Lane v. Thompson*, 43 N. H. 320, 324; *Richardson v. Palmer*, 38 N. H. 212. Regarding the two descriptions as equally explicit and unambiguous, being inconsistent with each other, that description must control which best expresses the intention of the parties as manifested by the whole instrument. By the first description, the premises conveyed are bounded southerly by Chapel street. By the second description, limiting the premises to the land on which the buildings are situated and the yard inclosed within the fence, the plaintiff's lot, instead of extending to Chapel street, is separated from it by a strip of land six feet and three inches in width, lying between the fence on the southerly side of the yard and the northerly line of Chapel street. This description excludes the plaintiff's lot and buildings en-

"There is but one principle applicable to questions of this sort. If there be but one description in the deed, that is to be strictly adhered to. If there be more than one, and they turn out upon evidence not to agree, that is to be adopted which is most certain. Course and distance from a given point is a certain description in itself, and therefore is never departed from, unless there be something else which proves that the course and distance stated in the deed were thus stated by mistake. It has been held that a tree called for and found not corresponding to the course and distance establishes the mistake, and is itself the terminus. So, of the line of another tract of land. But if the tree be not found, nor its former situation identified, it is the same as if the call for it had been omitted; for there is then no guide but the course and distance."<sup>1</sup> "The true rule of construction, where the parts of a description in a deed are inconsistent with each other, is to give effect to those consistent and intelligible portions which carry out the intention of the parties, and reject what is repugnant thereto. If the instrument defines with convenient certainty what is intended to pass by it, a subsequent erroneous addition will not vitiate it."<sup>2</sup> In a deed, the land conveyed was de-

tirely from the street, without even a right of passage way to it. Such could not have been the intention of the parties, and this description is manifestly erroneous as to the southerly line of the lot. It is equally incorrect when applied to the northerly line, as it leaves a strip of land between the northerly end of the stable and the Frye land, which is included in the first description, and which the grantor evidently intended to convey. The second description, therefore, being clearly erroneous as to the northerly and southerly lines of the lot, ought not to control the first description as to the easterly line. If there is an explicit and unambiguous grant of a thing, any exception or reservation which is manifestly contradictory will be rejected: *Rutherford v. Tracy*, 48 Mo. 325; 8 Am. Rep. 104; *Herrick v. Hopkins*, 23 Me. 217; *Pike v. Munroe*, 36 Me. 309; 58 Am. Dec. 751; *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46."

<sup>1</sup> *Ruffin, C. J.*, in *Den v. Graham*, 1 Dev. & B. 76; 27 Am. Dec. 228.

<sup>2</sup> *Raymond v. Coffey*, 5 Or. 132, 135, per Mosher, J. In this case the description was given by metes and bounds, to which was added the words, "being parts of sections twenty-five and thirty-six, in township four south, range three west"; it was claimed that these words constituted the particular description which should govern, and that the be-

scribed by fixed, known, and visible metes and bounds, as well as by corresponding courses and distances. A further description was also added, which bounded the land on its several sides by the lands of adjoining owners. Land included within the latter description was excluded by the former. An action of ejectment was brought against the grantee for the land not included in the former description, and the court decided that the apparent intention of the parties was not to convey different parcels of land by different descriptions, but to convey one piece, and that the first description in the deed, being more certain than the second, controlled the latter.<sup>1</sup> A description after naming a certain monument added, "thence running southerly by land improved by Gridley Putney to the road." A line running a little east of south would include the land improved by Putney in the granted premises. But a line running a little south of west, to the corner of the land improved by Putney, and thence along the line of this land a little east of south to the road, at a point almost south of the monument, would exclude such land from the granted premises. The court decided that it would adopt the latter construction as the true one.<sup>2</sup> Where a deed conveyed a tract of land described as "sixty acres of the west side of lot 6 of section 10, and lot 1, and S. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 11," and the three subdivisions thus mentioned constituted one body of land, lot 6 adjoining on the west each of the other subdivisions, the court held that by this conveyance, sixty acres off the west side of this body of land formed of these three subdivisions were conveyed, and that the deed did not convey both such sixty acres, and also the two easterly subdivisions.<sup>3</sup> If the statement of the courses or

ginning stake could not be located outside of these sections. But the court held that these words should be treated as words of general description, and if inconsistent with the description by metes and bounds, should be rejected.

<sup>1</sup> *Benedict v. Gaylord*, 11 Conn. 332; 29 Am. Dec. 299.

<sup>2</sup> *Bond v. Fay*, 8 Allen, 212; s. c. 12 Allen, 86.

<sup>3</sup> *Lovejoy v. Gaskill*, 30 Minn. 137.

boundaries is manifestly erroneous, the deed is not defeated when there remains a description sufficiently certain to locate the land.<sup>1</sup>

**§ 1038 a. Middle point of physical object intended.** Where any physical object or monument is designated as a boundary, the middle or central point of such boundary is implied in the absence of any qualifying term.<sup>2</sup> The courses and distances must yield to the actual line of a creek which is made the boundary of the land conveyed, the calls of the deed ascending the creek, and the line ascending the creek following the thread of the stream.<sup>3</sup> Where land is described as a subdivision according to a map of the block on file, and also by metes and bounds, the former description will prevail if there be a conflict.<sup>4</sup>

**§ 1039. Repugnance between general and particular description.**—Where there is a repugnance between a general and a particular description in a deed, the latter will control.<sup>5</sup> But whenever possible, the real intent is to be gathered from the whole description, including the

<sup>1</sup> *Thompson v. Ela*, 60 N. H. 562.

<sup>2</sup> *Freeman v. Bellegarde*, 108 Cal. 179; 49 Am. St. Rep. 76.

<sup>3</sup> *Freeman v. Bellegarde*, 108 Cal. 179; 49 Am. St. Rep. 76.

<sup>4</sup> *Masterson v. Munro*, 105 Cal. 431; 45 Am. St. Rep. 57.

<sup>5</sup> *Sikes v. Shows*, 74 Ala. 382; *Hannibal & St. Joseph R. R. Co. v. Green*, 68 Mo. 169; *Woodman v. Lane*, 7 N. H. 242; *Gano v. Aldridge*, 27 Ind. 294; *Bratton v. Clawson*, 3 Strob. 127; *Thorndike v. Richards*, 13 Me. 430; *Bell v. Sawyer*, 32 N. H. 72; *McEowen v. Lewis*, 26 N. J. L. (2 Dutch.) 451. See *Nutting v. Herbert*, 35 N. H. 121; *Barney v. Miller*, 18 Iowa, 460; *Smith v. Strong*, 14 Pick. 128; *Brunswick Savings Inst. v. Crossman*, 76 Me. 577; *Lovejoy v. Lovett*, 124 Mass. 270; *Fenwick v. Gill*, 38 Mo. 510; *Evans v. Greene*, 21 Mo. 170; *Barnard v. Martin*, 5 N. H. 536; *Flagg v. Bean*, 25 N. H. (5 Fost.) 49; *Carter v. White*, 101 N. C. 30; 7 S. E. Rep. 473; *Grandy v. Casey*, 93 Mo. 595; *Wharton v. Brick*, 49 N. J. L. 289; 8 Atl. Rep. 529; *Giulmartin v. Wood*, 76 Ala. 204; *Sikes v. Shows*, 74 Ala. 382; *Dana v. Middlesex Bank*, 10 Met. 250; *Whiting v. Dewey*, 15 Pick. 428; *Wright v. Mabry*, 9 Yerg. 55; *Fletcher v. Clark*, 48 Vt. 211; *Spiller v. Scribner*, 36 Vt. 245; *Cummings v. Black*, 65 Vt. 76; 25 Atl. Rep. 906; *Raymond v. Coffey*, 5 Or. 132; *Jones v. Pashby*, 62 Mich. 614; 29 N. W. Rep. 374; *Benedict v. Gaylord*, 11 Conn. 332; 29 Am. Dec. 299; *Barney v. Miller*, 18 Iowa, 460; *Waldin v. Smith*, 76 Iowa, 652; 39 N. W. Rep. 82; *Stafford v. King*, 30 Tex. 257; 94 Am.

general description as well as the particular.<sup>1</sup> In attempting to determine the intention of the parties from the whole instrument, we cannot say that a particular description in a deed is necessarily enlarged by a following general description, referring to and adopting the description of an earlier deed, even if the language employed by the grantor is "intending to convey the same and identical real estate conveyed to me by one," giving the name of such grantor, the date of the deed, and the book and page where recorded.<sup>2</sup> But where the description in the deed closes with a clause which clearly and unequivocally sums up the intention of the parties as to the particular property conveyed, such clause has a controlling effect upon all the antecedent phrases in the description. As for instance, such is the effect of a closing clause stating that "the premises hereby intended to be conveyed being the east half part of the farm whereon Johnson Babcock, now deceased, formerly lived, in the town of Tully."<sup>3</sup> Still each case must in a measure be decided by itself. A

Dec. 304; *Cullers v. Platt*, 81 Tex. 258; 16 S. W. Rep. 1003; *Moore v. Griffin*, 22 Me. 350; *Thorndike v. Richards*, 13 Me. 430; *Howard v. Saule*, 5 Mason, 410; *Witt v. St. Paul etc. Ry. Co.*, 38 Minn. 122; 35 N. W. Rep. 862; *Case v. Dexter*, 106 N. Y. 548; *Jones v. Smith*, 73 N. Y. 205.

<sup>1</sup> *Brunswick Savings Inst. v. Crossman*, 76 Me. 577.

<sup>2</sup> *Brunswick Savings Inst. v. Crossman*, 76 Me. 577.

<sup>3</sup> *Ousby v. Jones*, 73 N. Y. 621. See, also, *Jones v. Pashby*, 62 Mich. 614; *Bates v. Foster*, 59 Me. 157; 8 Am. Rep. 406; *Plummer v. Gould*, 92 Mich. 1; 31 Am. St. Rep. 567; 52 N. W. Rep. 146; *Ryan v. Wilson*, 9 Mich. 262; *Barney v. Miller*, 18 Iowa, 460; *Witt v. St. Paul etc. Ry. Co.*, 38 Minn. 122; 35 N. W. Rep. 862; *Bent v. Rogers*, 137 Mass. 192; *Paddock v. Pardee*, 1 Mich. 421; *Sprague v. Snow*, 4 Pick. 54; *Moran v. Lezotte*, 54 Mich. 83; *Chapman v. Crooks*, 41 Mich. 595. So where the deed recited, "The purpose and intent of this deed being to convey to the said second parties all and each of the right, title, claim, and interest, either in possession or expectancy, of the said first parties, of, in, and to the above-described premises, by virtue of certain deeds of conveyance," describing them, this general clause controls all the prior phrases of the description: *Plummer v. Gould*, 92 Mich. 1; 31 Am. St. Rep. 567. See to same effect, *Paddock v. Pardee*, 1 Mich. 421; *Ryan v. Wilson*, 9 Mich. 262; *Chapman v. Crooks*, 41 Mich. 595; *Moran v. Lezotte*, 54 Mich. 83; *Jones v. Pashby*, 62 Mich. 621; *Witt v. St. Paul etc. Ry. Co.*, 38 Minn. 127; *Barney v. Miller*, 18 Iowa, 460; *Sprague v. Snow*, 4 Pick. 54; *Bent v. Rogers*, 137 Mass. 192; *Bates v. Foster*, 59 Me. 157; 8 Am. Rep. 406.

deed described the land conveyed by metes and bounds, adding: "Being the same premises conveyed to me by Ezra Holden, by deed dated May 7, 1829, recorded with Middlesex deeds, book 315, page 120." It was contended that this language was intended as a general description of the land conveyed, and that, as in some respects the particular description was uncertain and indefinite, the general description should control. But the court observed: "This clause is entitled to some weight in determining the intention of the parties, but, in our opinion, it is not sufficient to overcome the inferences to be drawn from the other parts of the deed."<sup>1</sup> If both the repugnant descriptions are of equal authority, the one more favorable to the grantee must be adopted.<sup>2</sup>

§ 1040. Some illustrations.—A deed described the land intended to be conveyed as: "A part of fractional section number 19, being the half of the west half of the northwest quarter of section number 29, in township number 7 south, of range 14 west, containing forty acres, and also a small fraction of land, for quantity beginning at the northwest corner of the aforesaid forty acres, thence running with the west line sixteen poles, thence running to the river, a north corner, supposed to contain four acres." The court observed of this description: "Though the lands are very awkwardly described, yet we think that it may be ascertained with sufficient certainty from the language, that the undivided half of the lands in controversy was intended to be conveyed. Some effect will, if possible, be given to the instrument, for it will not be intended that the parties meant it to be a nullity. It is a rule of construction that words of particular description will control more general terms of description when both cannot stand together. Applying that rule here, all that is said of 'fractional section number 19' must be rejected, as contradicting the following definite description of the

<sup>1</sup> Lovejoy v. Lovett, 124 Mass. 270.

<sup>2</sup> Vance v. Fore, 24 Cal. 436; Hager v. Spect, 52 Cal. 579.

lands in section 29. Of this last, the 'half of the west half of the northwest quarter' is conveyed. This is definite, except as to the 'half,' and the language in that respect cannot be effective to convey any particular half. But there is nothing which forbids a construction which will make it good for an undivided half, and this it may receive. It was, we think, therefore, not void for uncertainty."<sup>1</sup> Where the description in a deed taken alone would include an entire tract, the interest conveyed will be restricted to an undivided half, if there is a clause added to the description that the grantor meant to convey all the land that he purchased of another, set forth in his deed recorded in a given book, if in that deed only an undivided half is conveyed.<sup>2</sup> A description, "my homestead farm in

<sup>1</sup> *Gano v. Aldridge*, 27 Ind. 294. In this same case there was another deed made by the same grantor, in which the description was: "A certain tract of land in Posey county, lying on the Wabash river, with numbers as follows: The half of a fraction number 29 (its west half of the fraction), containing five acres, more or less, in township 7 south, of range 14 west." This description was held to be unintelligible, and without evidence *aliunde*, no effect could be given to it.

<sup>2</sup> *Flagg v. Bean*, 25 N. H. (5 Fost.) 49. In this case the description was: "Three certain pieces or parcels of land, situate, etc., bounded S. E. by Bean's land and the cove, N. E. by Cocheco river, W. by Bean's land, land of Boyle and of Hurd, and the road," to which was added a clause, "meaning to convey all the land I purchased of S. D. Bryant, L. Bean, and A. Pinkham, referring to their deeds for particulars," and a further clause, "meaning to convey all the land set forth in said deed, and no more." To present to the reader the question before the court, and the construction placed upon the description, we take this extract from the language of Mr. Justice Bell, in delivering the opinion of the court: "The plaintiff contended that this deed conveyed to Bean the land *described* in the three deeds referred to, while the court instructed the jury that it conveyed to Bean only what those three deeds *conveyed* to Flagg. It is, of course, to be kept in mind that the only question presented to the jury was, whether this deed was procured by the defendant by a fraud practiced upon the plaintiff, by falsely reading to him the deed as conveying one undivided half of the land, when the deed had no such language. The court was presenting to the jury the actual state of the title of Flagg to the land, and the operation of the deed upon that interest, as ground for the jury to judge whether there was a fraud on the part of the defendant, or only very great ignorance on both sides, as to the actual situation of a very complicated title, and as to the effect of the deed upon it, from which they might infer that the deed was made in its present form merely by a gross blunder. The question, of course,



Bath, aforesaid, that I now live on and improve, it being the same land conveyed to me and one John Martin, by one Caleb Bailey, by his deed of December 2, 1816, and the said Martin's half of which he conveyed to me by his deed of December, 19, 1825," will not include a parcel of adjoining land conveyed to the grantor by Caleb Bailey, in 1819, though occupied with the other as one farm. By reference to the deeds of 1816 and 1825, the grantor expressly declared what he understood his homestead farm to be.<sup>1</sup> A description was in this form: "My homestead farm in Sanbornton, and is the same land which was conveyed to me by the deeds of one George Whittier, and the deed of one Reuben Whittier. One of said deeds from George is dated October 30, 1825, containing about twenty acres, recorded lib. 111, fol. 594; the other of said George's deeds is dated June 12, 1810, recorded lib. 78, fol. 859, containing thirty acres. The deed from said Reuben is

was, What does this deed in fact convey? The language would convey a fee simple in all the land comprised within the boundaries set out in the deed, unless its meaning is limited to the land conveyed to the grantor in the three deeds referred to, by the clause 'meaning to convey,' etc. This expression is twice used, and if the language following this phrase in those instances was found in separate deeds, it would hardly be understood to convey the same meaning. In the first instance it is, 'meaning to convey all the land I purchased by deeds,' etc., and in the second, 'meaning to convey all the land set forth in said deeds and no more.' But the whole deed is to be construed together; and it seems to us to be equivalent to the expression, 'meaning to convey all the land I purchased of B., etc., set forth in their deeds, to which reference is made for particulars,' etc.; and such an expression would be limited to the land actually acquired or obtained of those persons by purchase. If the last of the expressions only was used, 'meaning to convey all the land set forth in those deeds,' etc., it would not be easy to contend that it was not the intention to convey a fee simple in all the lands described, if it were not that two of the deeds referred to describe 'one undivided half' of the land, whose boundaries are set forth; and it seems very clear that a deed which describes an entire tract of land by its boundaries, and then adds, meaning to convey all the land set forth in such a deed, and no more, must be limited to one-half of the land described, if that deed, upon referring to it, conveys an undivided half merely. But taking the two expressions together, we think the opinion expressed by the court below, that nothing passed by Flagg's deed to Bean but the estate which he acquired by the deeds referred to, is correct."

<sup>1</sup> Barnard v. Martin, 5 N. H. 536.

dated 25th December, 1815, recorded lib. 111, fol. 593, containing about seventeen and a half acres—all in lot No. 24, in the second division of lots in Sanbornton. For a more particular description, reference may be had to said deeds; and the same is my homestead farm." The court held that this description did not include another tract used as a part of the homestead in common with those described by reference to the deeds.<sup>1</sup> Where the land conveyed was described as a certain share of "about one hundred acres of land, be the same more or less, with the buildings thereon standing, situate in the town of Chelmsford, in the county of Middlesex, being the same estate on which the said Moses Cheever now lives, and which was conveyed by Benjamin Melvin and Joanna Melvin to Dr. Jacob Kittridge, by deed dated the twenty-fifth day of April, 1782," and the grantee, as lessee and otherwise, had previously occupied the farm for many years, although the deed to which reference was made did not include the whole farm, yet it was held that the title to the whole farm passed to the grantee.<sup>2</sup> Where the lot conveyed is described as "being twenty feet in front, and running back one hundred and ten feet," and it is shown that the lot has, in fact, a frontage of thirty feet, parol evidence is admissible to show that the portion sold, and intended to be conveyed, and of which the grantee took possession, was the portion having a frontage of twenty feet on the east side of the lot.<sup>3</sup>

**§ 1041. Particular description uncertain.**—There is an apparent exception to be noted in cases where a general description will prevail over a particular one. These are cases where the particular description by metes and bounds is so uncertain that it is impossible to ascertain by reference to such description the particular parcel of

<sup>1</sup> *Woodman v. Lane*, 7 N. H. 241. In this case, the court examined several cases bearing upon the point in question.

<sup>2</sup> *Melvin v. Proprietors of Locks, etc.*, 5 Met. 15; 38 Am. Dec. 384.

<sup>3</sup> *Sikes v. Shows*, 74 Ala. 382.

land granted by the deed.<sup>1</sup> But, as was aptly said by Mr. Justice Bigelow, this is not a case "of two inconsistent descriptions, in which the general must yield to the particular, but of an uncertain and impossible description, which must be controlled by an intelligible though general description."<sup>2</sup> In the case of a deed describing the land conveyed as "the whole lot No. 14, containing five hundred acres by lot or grant, be the same more or less, which lot was the original right of Thomas Wallingford," it appeared that the right of Wallingford was to only four hundred acres. The court held that the additional clause did not restrict the effect of the deed to the four hundred acres, but that the deed should be construed as embracing the whole of the lot.<sup>3</sup> Likewise in a case where land was described as "all the undivided two-thirds of all the lands known by the name of Rancho de San Vicente, situate in the county of Los Angeles, and State of California," and also by a particular description which was erroneous, the deed, notwithstanding the errors in the particular description, was held to convey two-thirds of the tract thus generally described.<sup>4</sup>

**§ 1042. Parol evidence.**—If the language used in the descriptive clause is uncertain and doubtful, the practical construction given to the deed by the subsequent acts of

<sup>1</sup> *Sawyer v. Kendall*, 10 Cush. 241. See *Bott v. Burnell*, 11 Mass. 168; *Martin v. Lloyd*, 94 Cal. 195; *Wade v. Deray*, 50 Cal. 376; *Rayburn v. Winant*, 16 Or. 318; 18 Pac. Rep. 588; *Barney v. Miller*, 18 Iowa, 460; *Jackson v. Loomis*, 18 Johns. 81; *Loomis v. Jackson*, 19 Johns. 449; *Johnson v. Simpson*, 36 N. H. 91; *Adams v. Alkire*, 20 W. Va. 480; *Hathaway v. Power*, 6 Hill. 453; *Jackson v. Clark*, 7 Johns. 217; *Oredle v. Hays*, 88 N. C. 321; *Harkey v. Cain*, 69 Tex. 146; 67 S. W. Rep. 637; *Arambula v. Sullivan*, 80 Tex. 615; 16 S. W. Rep. 436.

<sup>2</sup> *Sawyer v. Kendall*, 10 Cush. 241.

<sup>3</sup> *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46.

<sup>4</sup> *Haley v. Amestoy*, 44 Cal. 132. Where a piece of land has a well-known name, it may be described by that name: *Haley v. Amestoy*, 44 Cal. 132. See, also, *Martin v. Lloyd*, 94 Cal. 195, where it is held that the description of a place excepted by name shows an intention to except the actual place named, and not to limit its actual boundaries by an uncertain description of them.

the parties may be shown by parol evidence.<sup>1</sup> But where it is apparent from the face of the deed that the grantor intended to convey a certain parcel of land, parol evidence is not admissible to show that he intended to convey another or additional parcel, notwithstanding words of general description, taken alone, without comparison with the preceding particular description, might seem to indicate this intention.<sup>2</sup> Mr. Justice Hoar of Massachusetts, correctly states the rule: "Where the terms are used in a description which are clear and intelligible, the court will put a construction upon those terms, and parol evidence will not be admissible to control the legal effect of such description. But where any part of the description is inconsistent with the rest, and thus shown to be erroneous, it may be rejected, and, when the description given is uncertain and ambiguous, parol evidence will be admitted to show to what it truly applies."<sup>3</sup> But a description, in which one call is, "thence running easterly parallel with the southern line of said Antelope ranch, according to the survey of the same made by the United States surveyor general for said State, to said Antelope creek," cannot be considered repugnant or ambiguous. Hence, it cannot be shown by evidence *aliunde* that a straight line was intended parallel with the general course of the southern line of the property designated the "Antelope ranch." While "parallel lines" are straight lines, according to their mathematical definition, yet, in common language concerning boundaries, this term is frequently used to designate lines which are not actually straight, but are the photographs of each other. In questions affecting boundaries, these words are, in this sense, often used by courts.<sup>4</sup>

<sup>1</sup> Lovejoy v. Lovett, 124 Mass. 270. See Lanman v. Ocker, 97 Ind. 163; 49 Am. Rep. 437; Truett v. Adams, 66 Cal. 618.

<sup>2</sup> Benedict v. Gaylord, 11 Conn. 332; 29 Am. Dec. 299.

<sup>3</sup> In Bond v. Fay, 12 Allen, 86, 88. And see, also, Waterman v. Johnson, 13 Pick. 261; Truett v. Adams, 66 Cal. 218.

<sup>4</sup> Fratt v. Woodward, 32 Cal. 219; 91 Am. Dec. 573. See, also, Hicks v. Coleman, 25 Cal. 143; 85 Am. Dec. 103.

§ 1043. **Description applying to several tracts.**—Where the description applies equally to several tracts, a latent ambiguity results, which may be explained by showing which one of the several tracts was claimed by the grantor.<sup>1</sup>

§ 1044. **Quantity of land enumerated.**—In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contained so many acres. But unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description.<sup>2</sup> Neither party has a remedy against the other for the excess or deficiency, unless the difference is so great as to afford a presump-

<sup>1</sup> *Clark v. Powers*, 45 Ill. 283.

<sup>2</sup> *Stanley v. Green*, 12 Cal. 148; *Snow v. Chapman*, 1 Root, 528; *Ware v. Johnson*, 66 Mo. 662; *Dalton v. Rust*, 22 Tex. 133; *Wadhams v. Swan*, 109 Ill. 46; *Miller v. Bentley*, 5 Sneed, 671; *Armstrong v. Brownfield*, 32 Kan. 116; *Belden v. Seymour*, 8 Conn. 19; *Ufford v. Wilkins*, 33 Iowa, 110; *Field v. Columbet*, 4 Saw. 523; *Marshall v. Bompert*, 18 Mo. 84; *Clark v. Scammon*, 62 Me. 47; *Mann v. Pearson*, 2 Johns. 37; *Hall v. Mayhew*, 15 Md. 551; *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Riddell v. Jackson*, 14 La. Ann. 135; *Commissioners v. Thompson*, 4 McCord, 434; *Jackson v. Defendorf*, 1 Caines, 493; *Wright v. Wright*, 34 Ala. 194; *Doe ex dem. Phillips v. Porter*, 3 Ark. 18; 36 Am. Dec. 448; *Powell v. Clark*, 5 Mass. 355; 4 Am. Dec. 67; *Chandler v. McCard*, 38 Me. 564; *Large v. Penn*, 6 Serg. & R. 488; *Pierce v. Faunce*, 37 Me. 63; *Jackson v. Barringer*, 15 Johns. 471; *Bratton v. Olawson*, 3 Strob. 127; *Allen v. Allen*, 14 Me. 387; *Dale v. Smith*, 1 Del. Ch. 1; 12 Am. Dec. 64. See *Mann v. Pearson*, 2 Johns. 37; *Hatch v. Garza*, 22 Tex. 176; *Smith v. Evans*, 6 Binn. 102; 6 Am. Dec. 436; *Jackson v. McConnell*, 19 Wend. 175; *Barksdale v. Toomer*, Harp. 290; *Smith v. Dodge*, 2 N. H. 303; *Jennings v. Monks*, 4 Met. (Ky.) 103; *Peay v. Briggs*, 2 Mill. 98; 12 Am. Dec. 656; *Jackson v. Sprague*, Paine, 494; *Perkins v. Webster*, 2 N. H. 287; *Kruse v. Scripps*, 11 Ill. 98; *Petts v. Gaw*, 15 Pa. St. 218; *Harris v. Hull*, 70 Ga. 831; *Luckett v. Scruggs*, 73 Tex. 520; *Doyle v. Mellen*, 15 R. I. 523; *Scott v. Pettigrew*, 72 Tex. 321; *Winans v. Cheney*, 55 Cal. 567; *Hess v. Cheney*,

tion of fraud.<sup>1</sup> Where an owner of a league of land, having sold off several tracts, executed a deed for the unsold balance, which described it as "all and singular a certain piece or parcel of land containing one thousand acres, situated and described as follows: "In Harris county, and on Buffalo bayou, adjoining the city of Houston, being the undivided part of the league granted to Allen C. Reynolds"—it was held that the deed conveyed title to the whole of the unsold balance, although in excess of the number of acres mentioned.<sup>2</sup>

§ 1045. **Intention that quantity shall control.**—But the language contained in the description may be such that it is evident that the parties intended to convey only a specified quantity of land, and in such case no more will pass. Thus a deed described a piece of land by boundaries and courses and distances, with this restriction: "Said tract to contain just one acre, and the distances shall be so construed." The court considered that the intention was clearly expressed that the quantity should be one acre, and that the distances should be construed so as to circumscribe one acre and no more, holding that the parties might contract so as to suspend the application of recognized rules of construction to their deeds.<sup>3</sup> And where the other terms of the description are not sufficiently certain, the number of acres specified may be an essential part of the description.<sup>4</sup> And there are instances in which the specified quantity of land may be considered in corroboration of other proof.<sup>5</sup> If a con-

83 Ala. 251; 3 So. Rep. 791; *Rand v. Cartwright*, 82 Tex. 399; 18 S. W. Rep. 794; *Case v. Dexter*, 106 N. Y. 548; *Thayer v. Finton*, 108 N. Y. 394; *Raymond v. Coffey*, 5 Or. 132; *Moran v. Lezotte*, 54 Mich. 83; 19 N. W. Rep. 757; *Benton v. Horsley*, 71 Ga. 619; *Andrew v. Watkins*, 26 Fla. 390; 7 S. W. Rep. 876. And see *Hasleton v. Dickinson*, 51 Iowa, 244.

<sup>1</sup> *Wadhams v. Swan*, 109 Ill. 46.

<sup>2</sup> *Hunter v. Morse*, 49 Tex. 219.

<sup>3</sup> *Sanders v. Godding*, 45 Iowa, 463.

<sup>4</sup> *Hall v. Shotwell*, 66 Cal. 379; *Kirkland v. Way*, 3 Rich. 4; 45 Am. Dec. 752; *Hostetter v. Los Angeles T. Ry. Co.*, 108 Cal. 38; *Ellis v. Harris*, 106 N. C. 395.

<sup>5</sup> *McClintock v. Rogus*, 11 Ill. 279. See, also, *Hicks v. Coleman*, 25

tract at an agreed price per acre has been made for the sale of a tract of land, represented as containing a specified number of acres, and there is a deficiency in quantity, a court of equity, even after the execution of the deed consummating the contract of purchase, will abate the value of the deficiency at the agreed price per acre from the portion of the purchase money remaining unpaid.<sup>1</sup>

§ 1046. Words "more or less."—When land is described, and the quantity is stated with the qualification "more or less," these words are used as an approximate designation of the quantity contained within the boundaries, and do not refer to the state of the title.<sup>2</sup> Where a tract of land originally described as eight hundred acres, "more or less," was conveyed by several successive deeds, describing the land similarly, but with the omission of the words "more or less," and the last purchaser conveyed an undivided interest in it to three persons, in an aggregate of just eight hundred acres, and subsequently conveyed all his interest in the land, describing it as excess "more or less above the eight hundred acres heretofore conveyed by this vendor," it was held that the last grantee took any excess over the eight hundred acres.<sup>3</sup> The word "about," used as qualifying the number of acres, means simply a near approximation to the number mentioned in

Cal. 122; 85 Am. Dec. 103; *White v. Gay*, 9 N. H. 126; 31 Am. Dec. 224; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Slack v. Dawes*, 3 Tex. Civ. App. 520; *Moran v. Lezotte*, 54 Mich. 83; 19 N. W. Rep. 757; *Santa Clara M. Assn. v. Quicksilver M. Co.*, 8 Saw. 330; 17 Fed. Rep. 657; *Baldwin v. Brown*, 16 N. Y. 359; *Bell v. Sawyer*, 32 N. H. 72; *Bioux v. Cormier*, 75 Wis. 566; 44 N. W. Rep. 654.

<sup>1</sup> *Thompson v. Catlett*, 24 W. Va. 524.

<sup>2</sup> *Williamson v. Hall*, 62 Mo. 405; *Armstrong v. Brownfield*, 32 Kan. 116, and cases cited; *Howell v. Merrill*, 30 Mich. 283; *McCoun v. Delany*, 3 Bibb, 46; 6 Am. Dec. 635; *Clark v. Scammon*, 62 Me. 47; *Dale v. Smith*, 1 Del. Ch. 1; 12 Am. Dec. 64; *Oakes v. De Lancey*, 133 N. Y. 227; 28 Am. St. Rep. 628; *Paine v. Upton*, 87 N. Y. 327; 41 Am. Rep. 371; *Belknap v. Sealey*, 14 N. Y. 143; 67 Am. Dec. 120; *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371; *Triplett v. Allen*, 26 Gratt. 721; 21 Am. Rep. 320; *Stevens v. McKnight*, 40 Ohio St. 341.

<sup>3</sup> *Troy v. Ellis*, 60 Tex. 630.



the deed.<sup>1</sup> By the use of the words "more or less," it is understood that the parties assume the risk of a gain or a loss in the quantity of land estimated. But an inquiry into a fraud which may have been committed by either party is not precluded by the use of that term.<sup>2</sup>

<sup>1</sup> *Stevens v. McKnight*, 40 Ohio St. 341.

<sup>2</sup> *McCoun v. Delany*, 3 Bibb, 46; 6 Am. Dec. 635. These words "more or less" have been construed in *Blaney v. Rice*, 20 Pick. 62; 32 Am. Dec. 204; *Phipps v. Tarpley*, 24 Miss. 597; *Tyson v. Hardesty*, 29 Md. 305; *Poague v. Allen*, 3 Marsh. J. J. 421; *Shipp v. Swan*, 2 Bibb, 82; *Sullivan v. Ferguson*, 40 Mo. 79; *Baynard v. Eddings*, 2 Strob. 374; *Hoffman v. Johnson*, 1 Bland, 103; *Brady v. Hennion*, 8 Bosw. 528; *Gentry v. Hamilton*, 3 Ired. Eq. 376; *Hunt v. Stull*, 3 Md. Ch. 24; *Nelson v. Matthews*, 2 Hen. & M. 164; 3 Am. Dec. 620; *Davis v. Sherman*, 7 Gray, 291; *Frederick v. Youngblood*, 19 Ala. 680; 54 Am. Dec. 209.





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